EMPLOYMENT TRIBUNALS

Claimant: Mr G Beckford

Respondent: TRW UK Ltd

Heard at: Birmingham

On: 2 – 12 August 2021

Before: Employment Judge Meichen, Mr R White, Mrs S Bannister

Appearances:
For the claimant: Ms Mullings, the claimant's wife
For the respondent: Mr Hartley, solicitor

JUDGMENT dated 13 August 2021 having already been sent to the parties 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. Oral reasons were given at the end of hearing and so these written reasons are based on a transcript of the recording of the oral reasons.

REASONS

Introduction

1. At the start of the hearing it was agreed that the claimant has three claims for us to determine: unfair dismissal, direct discrimination because of race and/or age and victimisation.

2. The essential law to be applied to those claims was contained in statute, namely s. 95 and 98 ERA 1996 and section 13 and 27 Equality Act 2010. We have considered all of those provisions.

3. There was an agreed list of issues which we were provided with at the start of the hearing.

4. There was also an agreed bundle of documents which run to 281 pages and a few documents were added by consent to that bundle during the course of the hearing.

5. The claimant gave evidence on his own behalf and also called his wife as a witness. In addition we heard evidence called by the claimant from Paul Kelly, who was previously employed by the respondent as a process quality technician.

6. On behalf of the respondent we heard evidence from the following witnesses:

6.1 Helen Davis who is a human resources manager employed by the respondent.

6.2 Martin Osin who is a plant engineering manager employed by the respondent and who took the disciplinary decision regarding the claimant.

6.3 Caroline Gionis who is a HR business partner employed by the respondent.

6.4 Robert Jarman who is a plant manager employed by the respondent and who considered the claimant's grievance.

6.5 Robert Brown who is an operations manager employed by the respondent and who heard the claimant's appeal against the disciplinary decision.

6.6 Kate Holland who is employed by the respondent as a compensation specialist which is part of the respondent's HR function.

7. All of the witnesses called were cross examined.

The issues

Time limits / limitation issues

8. Were all of the claimant's complaints presented within the time limits set out in sections 123(t)(a) it (b) of the Equality Act 2010 I"'EQA")/sections 23(2) to (4),) and 111(2)(a) & (b) of the Employment Rights Act 1996 ("ERA")? Dealing with this issue may involve consideration of subsidiary issues including. whether there was an act and/or conduct extending War a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable"- basis: when the treatment complained about occurred; etc.

Unfair dismissal

9. Was the claimant dismissed? The Claimant asserts that the new job he took on was so radically different from his previous job that it took effect as a dismissal. The respondent says that the claimant agreed to the change in his employment conditions and he was not dismissed.

10. If the claimant was dismissed, what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) 'of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

11. If so was the dismissal fair or unfair in accordance with ERA section 98(4). and, in particular did the respondent in all respects act within the so-called 'band of reasonable responses?'

Remedy for unfair dismissal

12. If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and a fair and reasonable procedure been followed / have been dismissed in time anyway]? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Equality Act, section 13: direct discrimination because of race and/or age

13. Has the respondent subjected the claimant to the following treatment:

a. Suspending the claimant on 4 September 2019.

b. Conducting an unfair investigation on 4 September 2019 and thereafter including by failing to interview key witnesses and not conducting a thorough investigation. The claimant says that Helen Davies and Anthony Wilkins were the individuals responsible. The claimant also alleges that the investigation should have been conducted by Alison McCurry.

c. In the disciplinary meeting on 20 September 2019, Martin Osin refused to allow the claimant's wife to accompany him for support. The claimant was suffering with anxiety at the meeting.

d. In the disciplinary meeting on 20 September 2019, Martin Osin was aggressive and condescending in the way that he spoke to the claimant. He made false assertions and statements about the claimant and his conduct. The claimant says that Martin Osin was sarcastic, bullied the claimant and was biased.

e. The claimant was required to wait ten days between the disciplinary hearing on 20 September 2019 and the outcome on 30 September 2019. The claimant was not

provided with notes of the meeting. The claimant says that the respondent's HR officer, Helen Davies, was condescending, unhelpful, off- hand and rude.

f. At the disciplinary outcome meeting on 30 September 2019 Martin Osin took the opportunity to go back over everything that had been referred to before and was condescending and mocking of the claimant. In deciding that the claimant was guilty of gross misconduct and negligence, he took into account non-factual matters including the claimant's supervisor saying that the claimant was not a good worker, Martin Osin failed to take into account that the claimant was training on the line and that the value of the loss was not the claimant's fault but that of other operatives.

g. At the disciplinary meeting on 30 September2019, Martin Osin found that the claimant was guilty of gross misconduct and negligence and imposed the sanction of summary dismissal or accepting a demotion.

h. At end of meeting on 30 September 2019, Martin Osin only gave the claimant ten minutes to decide whether to accept the demotion.

i. On 18 October 2019 Helen Davies refusing the claimant's request (made on 17 October 2019) for the attendance of his supervisors Mark Webster and Alison McCurry to be invited to the appeal hearing.

j. On 21 October 2019 Robert Brown (Production Manager) upheld the disciplinary sanction and findings on appeal despite acknowledging that the claimant had not acted intentionally and that he was training on the line at the time.

k. On 22 November 2019, Helen Davies required the claimant to attend a meeting, threatened that he would lose pay if he did not attend and during that meeting disclosed the claimant's occupational health notes to Anthony Wilkins in breach of data protection rules.

l. On or around 13 January 2020, Caroline Gionis did not allow the claimant's support (of his wife) during the investigation meeting -highlighting her prior knowledge of claimant needs and not being independent. The claimant says that the Caroline Gionis and Kate Holland were not independent. The grievance process was not followed, it was delayed and passed around to different people and that Caroline Gionis was biased.

m. Kate Holland was not independent and refers to Helen Davies on first name terms and makes the same objection to claimant's wife supporting him.

14. Was that treatment "less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators Haroon Hussain, Connor Jackson, Emily Knottley, Lisa Alsop, Kevin Walmsley, Peter Thompson, Alison McCurry and /or hypothetical comparators.

15. If so, was this because of the claimant's

1. race (being Black Caribbean) and/or because of the protected characteristic of race more generally; and/or
2. age (being aged 62/63 at the relevant time) and/or because of the protected characteristic of age more generally?

Age only:

16. If so, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The respondent has not pleaded a legitimate aim.

Victimisation (Equality Act 2010 section 27)

17. Did the claimant do a protected act as follows:

    a. On 30th September 2019 orally during the disciplinary hearing.
    b. On 4 October 2019 in writing to the respondent when he stated "I have found this disciplinary process to be biased and it has victimised me personally due to the wholly inconsistent company approach and unproven finding".
    c. On 1 December 2019 in a grievance submitted to the respondent.
    d. On 26 January 2020 presenting a claim to the Employment Tribunal.

18. Did the respondent do the following things:

    a. The treatment outlined at paragraphs 7e to l. above.
    b. Between October 2019 and January 2020 being subjected to an unusually high level of contact from Helen Davies regarding requests of confirmation of sick leave, by letters/emails sent on 23, 28 & 29 October, 13, 14, 18 and 22 November and 11 and 18 December 2019 and a number of phone calls during this period.
    c. Having confidential information sent to him from the respondent by taxi on 29 October 2019 and 17 January 2020.
    d. Did Disciplinary decision makers find the claimant guilty of 'Serious Negligence so as to fit within the definition of Gross Misconduct'. The suspension on 4th September 2019 was for the purposes of investigation – stated as, 'allegations of serious negligence'. Following that investigation stage – the claimant was invited to a disciplinary hearing (For 20th September 2019) by letter which referred to 'alleged negligence'.
    e. Impose a termination of his contract as Team leader/Line Leader and therefore dismissed from his original terms and conditions.
    f. Was there a breach of contract giving rise to unauthorised deductions of salary.

19. By doing so, did it subject the claimant to detriment?

20. If so, was it because the claimant did a protected act?

Remedy

21. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

    a. What losses has the claimant incurred as a result of the respondent's actions?
    b. What steps has the claimant taken to mitigate those losses?
    c. Whether the claimant has suffered any injury to feelings. The attention of the claimant is drawn to the case of Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871 and the presidential guidance on Employment Tribunal awards for injury to feelings and psychiatric injury of 5 September 2017 and the update of 25 March 2019 for the purposes of preparing his schedule of loss.

22. If it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?

23. Did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any [compensatory] award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

24. Did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any [compensatory] award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

Our findings of fact

25. The claimant's employment with the respondent started in August of 2000.

26. Until the events which we are concerned with which occurred in Autumn 2019 the claimant had a faultless employment history with the respondent with no disciplinary issues. He was plainly a good worker because he had been promoted to the position of team leader. That was the position which the claimant was employed in prior to the events we are concerned with

27. The respondent's business is the manufacturer of automotive products.

28. The claimant's duties involved working on the production lines which made those products.

29. At the time of the events we are concerned with the claimant was working night shifts and he was working on production lines which made electrical circuit boards which would be placed in cars and other vehicles. We accept the respondent's evidence that those products are safety critical.

30. In June 2019 the claimant was moved to work on a new production line known as the H line. We were told and accept that this line produced electrical circuit boards which were used as part of the braking system in cars.

31. Although he was by this time an experienced member of the respondent's staff the claimant was new to that particular production line and was naturally unfamiliar with the process. The claimant was therefore being trained on how to operate on that production line. The person who he was assigned to for training, who was known as his mentor, was Bernadette Johnson.

32. The claimant only worked a few shifts on the H line from around June 2019 before he had to take a period of time off after he had an operation on his eye.

33. The claimant was off for about two months and he returned to work in September 2019

34. On the 3rd of September 2019 which was only the claimant's first or second night back after his period of absence there was an incident on the production line which the claimant was working on.

35. The claimant's work on that line involved splicing reels into a machine by attaching them what was to what was known as a tail end. It was important for the production process that the correct reel was spliced to the correct part of the machine.

36. It appears that 2 reels were spliced to the wrong tail end. This caused a substantial amount of loss for the respondent in the form of waste product. Different figures have been given for the loss sustained by the respondent but it appears most likely that the amount of loss was calculated at between 16 and 18,000 pounds.

37. The respondent was able to establish from the machine's records that it was the claimant who had scanned in the two reels which were spliced at the incorrect point and the reels had been spliced in succession with a gap of around 12 1/2 minutes between the two.

38. The claimant did not realise that this incident had occurred. He completed the rest of his shift without any issue being raised with him.

39. It appears that the incident was in fact not picked up until the next morning. The delay in identifying that an incident had taken place may have contributed to the amount of loss which the respondent ended up incurring. It is therefore unfortunate that the incident was not picked up earlier. Moreover had the incident been picked up earlier it would have meant that the matter could have been raised with the claimant on the night shift in question and he may well have been able to explain what had gone wrong.

40. Having said that on the evidence which has been put before us we do not think that the delay in picking the incident up was there as a result of any deliberate

act or negligence by the respondent. It was simply the way in which the process operated on that night meant it was not picked up until much later.

41. When the claimant arrived for work on the next evening which was the 4th of September he was suspended so that the respondent could carry out a disciplinary investigation.

42. The claimant was informed that the respondent was looking into allegations of serious negligence as the claimant was alleged to have failed to follow the standard operating procedures which had resulted in the reels being fitted incorrectly on the night of 3rd of September.

43. The respondent's standard operating procedures are written documents which as you might expect are fairly complicated and detailed written procedures which explain all the actions which should be taken as part of a particular production process.

44. Tony Wilkins who was the respondent's business unit manager investigated the matter. The point was made on the claimant's behalf in the hearing before us that incidents of this nature would normally be investigated by the workers supervisor who in the claimant's case was Alison McCurry but in this matter it was effectively escalated to a higher level of management.

45. Mr Wilkins undertook investigation meetings on the 4th of September. He interviewed Alison McCurry who was the claimant's supervisor and Bernadette Johnson who as we have explained was responsible for training the claimant and was his mentor on the new production line.

46. Bernadette Johnson was asked what we consider to be an important question by Tony Wilkins. Mr Wilkins asked Bernadette Johnson if the claimant was OK to splice alone. This was a significant question because as we have explained the claimant was still new to the line and was in the process of being trained up. Nevertheless he had apparently been left to splice the reels in question on his own. Bernadette Johnson's answer to that question was: *"yes and no he understands what you show him but reels on the same feeder can get mixed up."*

47. The claimant's own trainer was therefore at best equivocal over whether the claimant was indeed OK to be left to splice alone.

48. Mr Wilkins also interviewed the claimant before he went home suspended on the night of 4th of September. The claimant was asked if he was confident splicing alone and he replied that it was not that he is not confident but he thought somebody should be with him. He also said that he had said that he needed to be watched at all times.

49. Importantly in our view the claimant also told Mr Wilkins that he had been working on the night in question with another operative who was Amir.

50. The claimant was asked some general questions about the process of splicing. Strangely however he was not asked to give an account of how the incidents of the two reels being placed incorrectly had actually occurred.

51. The claimant was also not informed why or how the respondent considered that he may have breached the standard operating procedure.

52. The claimant was then invited to a further investigation meeting with Mr Wilkins which took place on the 11th of September. In this meeting the claimant was asked the crucial question by Mr Wilkins which was to talk him through how the claimant thought the incident may have happened. Unfortunately the claimant's answer to that question was: *"not really no".* Obviously this did not take the respondent any further forward in terms of understanding what had taken place.

53. Although it looks very much from the claimant's answer as though he had misunderstood the question Mr Wilkins, again we have to save strangely, did not follow up on that question instead he just moved on to his next question. This meant that the claimant had not given any account of what had actually taken place on the night in question.

54. Despite the fact that the claimant had not given an account of what had taken place and despite the fact that the claimant had clearly said at the very first meeting that he had been working with Amir Mr Wilkins did not take any steps to interview Amir or do anything else which might have established what had actually taken place which had resulted in the two reels being incorrectly spliced.

55. In the second meeting on the 11th of September Mr Wilkins did make reference to the standard operating procedure and in particular the part of the procedure which identifies that multiple reels must not be changed together and they must be done on a one to one basis. However when that was put to the claimant he said he didn't know what the standard operating procedures meant as he was training and he was still trying to understand the process. It is difficult to see how that answer supported a case of gross negligence against the claimant. Rather, it suggested the claimant had not been fully trained up.

56. In addition, Alison McCurry did some further investigation with Bernadette Johnson. Bernadette Johnson was asked the specific question had she shown the claimant the standard operating procedures as part of his training and her answer was no. That evidence was provided to Mr Wilkins and was subsequently provided to the disciplinary process by Helen Davis.

57. The respondent's evidence before us has heavily emphasised the importance of the standard operating procedures and the respondent's case was that a failure to follow the procedure would amount to gross negligence justifying summary dismissal. If that is the case it is difficult to understand how the claimant could have been properly trained up to work on a new production line without his trainer ever showing him the procedure.

58. In summary, the following evidence which was obtained in the investigation was significant to the allegation of gross negligence by way of failure to follow the standard operating procedure:

    a. that the claimant was training at the time the incident took place,
    b. that he was unsure of the process and unfamiliar with the standard operating procedure,
    c. that his training supervisor was equivocal about whether he should be left to splice on his own,
    d. that the claimant believed he needed to be watched at all times,
    e. that his training supervisor had not shown him the standard operating procedures as part of his training.

59. The above points do not appear to have been properly considered at the disciplinary stage.

60. It was also significant that the investigation had failed to clearly establish the facts of what took place on the night of the 3rd of September and it had failed to clearly identify the breach of the standard operating procedures which the claimant was alleged to have made. Those deficiencies do not appear to have been picked up in the disciplinary process.

61. The claimant was invited to a disciplinary hearing to take place on the 20th of September. He was again informed that the allegation was of negligence in that he had failed to follow the standard operating procedures resulting in parts being fitted incorrectly on the night of 3rd of September. Again what the claimant was actually alleged to have done on the night of 3rd of September was not set out and nor was it explained which part of the procedure he had failed to follow and how he had failed to follow it.

62. The disciplinary hearing was conducted by Martin Osin. In the meeting the claimant again made the point that he was unfamiliar with the process on the H production line. He said that it was a new area and a new process for him and he was going in there as a trainee.

63. The claimant also again referred to the fact that he had been working alongside Amir and in fact he described Amir as the person that he had been assigned to shadow as part of his training. The respondent does not appear to dispute that the claimant was assigned to shadow Amir as part of his training on the night in question but again that information did not result in Amir being interviewed.

64. The claimant also made it clear to Mr Osin that that he had not seen the standard operating procedures. Mr Osin suggested that the claimant was an experienced member of staff and a team leader and therefore the onus would be upon him to pick up and read the standard operating procedures. The claimant's response to that was that he was being trained whilst on the job and there was no time to pick them up and read them on his own. Again it is difficult to see how that answer supported the case of gross negligence and it is unclear how and when the respondent expected the claimant to read the procedures in

light of his answer. There is no suggestion, for example, of the claimant being given time off a shift in order to read up on the procedures.

65. As to what had actually taken place on the night in question the claimant said that he had been handed the reel to place on the production line by another trained operative. In context it was quite clear that the claimant was referring to Amir. Again this did not result in the respondent seeing any need to interview Amir despite the fact that the claimant was now saying that he was intrinsically involved in the process of the wrong reel being spliced.

66. The hearing of 20 September was relatively lengthy and detailed but other than the points which the claimant volunteered about being handed the reel by another operative Mr Osin did not actually ask any questions about what had taken place on the night of 3rd of September. In particular he did not ask any questions to try and understand how this mistake had been made. Again he did not identify the part of the procedure which the claimant was alleged to have breached or how he was alleged to have breached it.

67. The disciplinary hearing was then reconvened on the 30 September 2019. At that meeting the claimant had prepared a written document setting out his response to the allegations of negligence. He handed that written document over during the meeting and read at least some of it out.

68. In the tribunal's view this document raised important issues. In particular the claimant raised concerns that he had not been appropriately trained and it had been inappropriate for the respondent to have left him to work on his own. It has to be observed that that point was in fact supported by Bernadette Johnson when she had been equivocal at an early stage in the investigation over whether the claimant should in fact have been left to work on his own. The claimant’s point about his training being insufficient also appears on the face of it to be backed up by Bernadette Johnson's admission that as part of the training she had not even showed him the standard operating procedures.

69. In his written document the claimant also explained in a bit more detail his explanation that Amir had in fact handed him the reel which had ended up being incorrectly placed. The claimant specifically said that it was as a result of being handed the reel by the person he was shadowing that he assumed it was the correct reel and that the correct process was being followed. The claimant then explained that an alarm had gone off which meant that Amir had had to go and attend to something else leaving him on his own.

70. If the claimant’s explanation was correct then it would strongly suggest that his level of culpability was low and insufficient to justify a finding of gross negligence. We regret to say however that that that explanation as to what took place appears to us to have been completely ignored by the respondent and in particular by Mr Osin.

71. We do not consider that Mr Osin was aggressive, condescending, bullying or sarcastic in the way alleged by the claimant. We simply think that he failed to focus his mind properly on the charge which was actually before him – which

was that the claimant had been negligent by failing to follow the procedures on the night of the 3rd of September. It seems to us to be manifestly obvious that in order to determine that allegation fairly Mr Osin had to address his mind as to what actually took place on the night of 3 September, what part of the procedure the claimant was meant to have breached and how he was meant to have breached it. However Mr Osin failed to address his mind towards any of those crucial matters and he appears to have ignored the claimant's evidence which strongly suggested a low level of culpability on his part.

72. In his written document the claimant described how he considered the respondent's actions were discriminatory because other operatives had been involved in similar incidents and not been suspended. The claimant further referred to being victimised. When read in context it is clear that the claimant meant at the time that he was being singled out rather than the Equality Act meanings. It was not until the claimant made his Tribunal claim that he said for the first time that he believed he had been discriminated against because of race or age or victimised in the Equality Act sense.

73. At the time of the second disciplinary meeting the claimant emphasised that he had been a conscientious and hard worker for the respondent over a period of some 19 years and he had worked his way up a to a team leader having never received a disciplinary sanction or warning. These were valid points for the claimant to raise. However the respondent does not appear to have attached much if any weight to those factors.

74. The purpose of the 30 September meeting from Mr Osin's perspective seemed simply to be to communicate the decision which he had already made. Mr Osin read out a summary of his decision and his reasons for it. What Mr Osin read out was provided to the tribunal. Mr Osin said that the claimant was aware of the procedures but had made a decision not to follow them. As a result of that Mr Osin considered that what happened was not an accident and it was serious negligence.

75. We have to say immediately do we do not think there was any evidence that the claimant had made a decision not to follow the procedures or that what had taken place was anything other than an accident.

76. As part of his decision Mr Osin did not attempt to explain what he believed may actually have occurred on the night of 3rd of September and again he did not identify the part of the procedure which the claimant was meant to have breached or explained how the claimant had breached it .

77. Nevertheless Mr Osin said that the claimant had committed gross misconduct the penalty for which was dismissal without notice pay.

78. However Mr Osin was plainly aware of the respondent's disciplinary procedure which says that in exceptional circumstances he could ask for the claimant's agreement to demotion as an alternative to dismissal.

79. The way in which this possibility was put to the claimant is extremely important. It was only put to the claimant after Mr Osin had made it clear that he considered the claimant had committed gross misconduct and the penalty for that should be dismissal. After having said that Mr Osin went on to say that he had the authority to make a recommendation that the claimant be demoted from team leader back to operative with a warning on file. Mr Osin then said as follows: *"I would suggest that you give this serious consideration as the alternative will be your dismissal from the company without notice pay".*

80. This was in effect an ultimatum. The claimant was being very clearly told that if he did not agree to be demoted then he would be summarily dismissed. The claimant was given only 15 minutes to make his decision. In the event we understand that the claimant took 25 minutes. However that difference in our view is of little importance. The reality was that the claimant had to make this decision under very significant pressure: firstly from the threat of summary dismissal which the respondent had made crystal clear was hanging over him and secondly from the short time which he was given to consider his position.

81. The claimant was clearly not able to take advice before making this important decision, although we understand he may have spoken to his wife. When the meeting resumed after 25 minutes the claimant said that he would accept the demotion and the warning.

82. The claimant was sent a letter also dated the 30th of September confirming the decision which had been made. The letter said that the company considered the claimant's behaviour to be seriously negligent but again what the claimant was actually believed to have done which was negligent was not set out. Again the respondent did not explain which part of its procedures the claimant was meant to have breached or how he was meant to have breached them.

83. The claimant's demotion took place with immediate effect. This meant that he was no longer a team leader and was instead in the position of operative. The demotion had a financial impact because the claimant had been on a salary of around £30,000 per annum and this was reduced to around £27,000 per annum This was a reduction of around £3000 or roughly 10% of the claimant's total annual salary.

84. The claimant was obviously dissatisfied with the result which had been reached. On the 4th of October he wrote to appeal against the disciplinary outcome. He said his actions on the night of 3rd of September were not down to negligence but a human error. He also referred to failures in his shadowing and his training which contributed to what had happened He emphasised the point that the reel which had been incorrectly placed had in fact been handed to him by the person who he was shadowing. Overall the claimant made it clear that he was objecting to the findings and the outcome of the disciplinary.

85. The claimant followed up on his initial appeal documents with a further letter which he sent on the 15th of October. The claimant again reiterated the concerns over his training and referred to the fact that he had never completed a training matrix for his progress since he moved to H line.

86. In the hearing before us the respondent accepted that there was in fact no training record for the process of training the claimant up on the H line. There was no evidence to contradict the points the claimant made about the unsatisfactory nature of his training and indeed as we have observed the evidence which was available from the claimant's training mentor tended to support that of the claimant.

87. The claimant also said that the finding that he had decided not to follow the standard operating procedures had not been proved. He asked what the facts were which the respondent was relying on to show serious negligence. These were very fair points for the claimant to make which we do not think were addressed by the respondent.

88. In summary it was quite clear that the claimant was saying that he accepted that he had made a mistake but there was nothing to show that it was negligent. We think that was a valid argument for the claimant to make and it does not appear to have been engaged with by the respondent.

89. On the 18th of October 2019 Helen Davis wrote in response to the claimant and said that if the respondent considered that any further investigations needed to be done including interviewing witnesses that would be done before the appeal panel made their decision.

90. The claimant's appeal hearing took place on the 21st of October 2019 and it was heard by Robert Brown. In the meeting the claimant again explained that he was undergoing training at the relevant time and he did not think that he was going to be left on his own. The claimant was asked some questions about what had actually taken place on the night in question. The answers did not disclose any clear evidence that the claimant had breached the operating procedures or been seriously negligent. It was not put to the claimant what the respondent considered he had done wrong and in particular it was again not explained what part of the procedure he was meant to have breached and how he was meant to have breached it.

91. Notably the claimant was asked about when he had scanned the reel and he said he said that he had scanned it after splicing. Mr. Brown told us that he accepted the claimant's evidence on that point. That is significant because for the very first time in the hearing before us the respondent suggested that the breach of the procedure which the claimant was meant to have done was to scan before splicing rather than after splicing.

92. There is no evidence that the claimant did that and as we have just said Mr. Brown in fact accepted that that was not the case. The claimant was never challenged on his evidence on that point and it was never put to him that he had scanned before splicing.

93. The respondent also suggested in the hearing before us, again for the very first time, that the mistake which was made on the night of 3rd of September could

not have been made if the claimant had scanned after splicing. Again that point was never raised during the investigation, the disciplinary or the appeal and it was in fact contradicted by Mr. Brown who said that he had accepted the claimant's evidence that he had scanned after splicing. We think that if the matter really was as clear cut as that it would have been explained on that basis during the investigation, disciplinary or appeal process. For those reasons we did not accept the respondent's assertions on that point

94. Mr. Brown asked the claimant some significant questions about his training. In particular he asked the claimant if he had been signed off to splice on his own and the claimant said no. Again Mr. Brown appears to have accepted that evidence. However it again does not appear to have been taken into account.

95. On the evidence before the respondent the claimant appeared to have been left to slice on his own when he was still undergoing training and his training mentor did not appear to think he should be splicing on his own. None of that appears to have been taken into account in Mr Brown's or Mr Osin's decision.

96. The other significant issue on the appeal is that the claimant again explained to Mr. Brown that what happened was that Amir had passed him the reel which turned out to be the one that was inappropriately placed and then an alarm had gone off which had resulted in Amir leaving the claimant on his own. The claimant explained that when the first alarm had gone off to identify that the first reel needed to be placed Amir had said "I will get you the reel".

97. Therefore what the claimant was suggesting was that Amir was at fault. This was particularly significant in the context of the claimant shadowing Amir and therefore in effect working under his instruction. Again however these factors do not appear to have been taken into account in the appeal decision and even at this stage the respondent did not take the opportunity to interview Amir so as to actually establish the facts of what had taken place on the night of the 3rd of September.

98. The fact is that the whole process of investigation, disciplinary and appeal was concluded without the respondent ever establishing the facts which it relied on to show the claimant was negligent. The respondent never identified the part of the procedure which the claimant was meant to have breached or how he was meant to have breached it.

99. This deficiency has led to the rather unsatisfactory situation we have described of the respondent only identifying potential breaches of the procedure in the hearing before us. We have been encouraged during this hearing to find that the claimant must have failed to follow the operating procedure either by changing two reels at the same time or by scanning the reel before splicing it. We do not consider there is sufficient evidence for us to conclude that either of those two things must have taken place. We do not think there is any witness evidence which supports the contention that the claimant was changing two wheels at the same time or that he scanned before splicing.

100. Crucially, we do not think that either of decision makers actually had those reasons in mind when they made their decisions - if they had it would have been very easy to say so but they never did. Mr. Brown in fact told us that he accepted that the claimant had scanned after splicing which directly contradicts the case which the respondent has very late in the day asked us to accept.

101. The appeal outcome was sent to the claimant on the 25th of October 2019. The decision was taken to uphold the disciplinary outcome.

102. Following his demotion the claimant returned to work for a few shifts but was obviously finding things hard. He experienced what he described as a panic attack at work and was sent home.

103. On 16 October 2019 the claimant was signed off as unfit for work due to stress at work and he remained signed off until the 14 January 2020.

104. The claimant was invited to a meeting to discuss his absence from work which took place on the 22 November. This meeting was conducted by Helen Davis. The claimant was accompanied by his wife. The claimant was clearly in a bad place. He attended the meeting wearing a hat and dark glasses and he appears to have been highly anxious. He did not speak at all during the meeting and on his behalf the claimant's wife indicated that he could not say when he might be able to return to work.

105. The claimant subsequently raised a grievance about the respondent's conduct at the meeting on the 22 November 2019. In his grievance the claimant objected to the fact that he had been asked to give a time frame of when he might be able to come back to work. The claimant also complained about the fact that Tony Wilkins had been present in the meeting. The tribunal understands that Mrs Davis had asked Mr Wilkins to attend so that there was somebody from the claimant's management team there. However it had not been explained to the claimant that he would be in attendance and this evidently caused the claimant some concern. He felt it was insensitive and potentially a breach of GDPR that his medical condition had been discussed during the meeting in front of Tony Wilkins and that reference had been made to an occupational health report in his presence.

106. The claimant's grievance was investigated by Caroline Gionis and she had an investigation meeting with the claimant on the 13th of January. Mrs Gionis recorded the investigation meeting but unfortunately her recording equipment malfunctioned and this meant that she had to type up the notes from the notes that she'd made during the hearing and therefore they were not verbatim.

107. Mrs Gionis also held investigation meetings with Tony Wilkins and Helen Davies

108. The notes from the grievance investigation meetings were sent to the claimant. However the claimant refused to sign or agree them. The claimant was evidently concerned about the fact that the notes could not be said to be verbatim due to the failure of Mrs Gionis' recording equipment .

109. Mrs Gionis also prepared an investigation report, but that was not provided to the claimant - it was simply made available to the grievance decision maker. We think that was unfortunate as it was a balanced report and it could have alleviated some of the claimant's concerns. In the interests of transparency we consider it would have been better it the report had been provided to the claimant.

110. The claimant was invited to attend a grievance hearing on the 20th of November but he declined to attend that. The claimant was offered alternative dates for the hearing of his grievance. The respondent also made it clear that they would re-investigate in light of the issues the claimant had over the recording and notes of the investigation meetings. The claimant declined all of those proposals.

111. In the event the grievance hearing took place on the 10th of February 2020 in the claimant's absence. The outcome was sent to the claimant by letter dated 10th of February 2020. The grievance was not upheld. The claimant was informed that he had a right to appeal that decision. The claimant did not appeal.

112. The claimant continued to work for the respondent although we understand he was furloughed for a period in 2020.

113. On 19 May 2020 the claimant volunteered for redundancy and the respondent approved his application.

114. The claimant's employment with the respondent terminated by reason of redundancy on 30 June 2020. The claimant received pay in lieu of notice and a redundancy payment .

Conclusions

Dismissal?

115. We deal firstly with the question of whether the claimant was dismissed. Dismissal was not accepted and therefore the burden of proof was on the claimant to show he had been dismissed.

116. The claimant put his case first and foremost on an argument that he had been expressly dismissed by the respondent. This meant that we had to consider whether the claimant had been dismissed within the meaning of section 95(1)(a) Employment Rights Act 1996. That provides that an employee is dismissed where the contract under which he is employed is terminated by the employer.

117. In Martin v Glynwed Distribution Ltd [1983] ICR 511 the Court of Appeal said: *'Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?". If the answer is the employer, there was a dismissal.'* This is a question of fact for us to decide.

118. On the respondent's case what happened was that there was an agreement to vary the claimant's employment contract by way of the demotion and there was no dismissal. In contrast the claimant's case is that in reality there was no agreement and that what took place was in effect a unilateral variation of the claimant's terms and conditions. The claimant argues that the variation was so substantial as to amount to a dismissal and re engagement on new terms.

119. It is well established from the case of Hogg v Dover College [1990] ICR 39 that a dismissal can take place where an employer unilaterally imposes radically different terms on an employee. As Mr Hartley correctly identified, and as is clear from the case of Hepworth Heating Ltd v Akers and ors EAT 846/02, the assessment of whether the new terms are so substantially different as to amount to a new contract is a question of fact for us as a tribunal to determine.

120. Mr Hartley argued that in this case and in particular by reason of what he described as the "modest" reduction in the claimant's salary that there was no substantial change to the claimant's contractual terms. We do not agree.

121. Firstly it is relevant in our view that pay is a fundamental term of the employment contract. From the employee's point of view it is likely to be the most important term in the contract; any real change is likely to have an impact. Secondly we do not consider that a reduction in salary of 10% can fairly be described as modest. We do not think many employees would feel that way if they were to face such a reduction.

122. Moreover the reduction in the claimant's pay was not the only variation to the claimant's terms. The demotion also necessarily entailed a change in position - specifically a reduction in the claimant's level of seniority. As the claimant's wife correctly pointed out in her closing submissions the demotion from team leader to operative meant that the claimant lost the supervisory element of his role which involved leading a team. There was therefore also a reduction in duties which was accompanied by the loss in status associated with the demotion.

123. We think adding those factors together it is in fact very clear that the change in terms and conditions which took place in this case was substantial and significant.

124. We next consider the question of whether the claimant can be said to have agreed to the variation in his employment contract. The tribunal was not aware of any authority which deals directly with the situation where an employee has supposedly agreed to be demoted in response to a threat of

dismissal. We raised that with Mr Hartley in advance of closing submissions so that he could bring to our attention any authority which he was aware of at which dealt with that specific point. Mr Hartley was also not able to identify any authority which deals specifically with the issue.

125. However there have been a number of cases where an employer has given an employee the choice of resigning or being dismissed. While such cases are fact sensitive they can result in a finding of dismissal, in particular where an employee is told that they will be dismissed if they do not resign there may be a dismissal.

126. In East Sussex County Council v Walker [1972] 7 ITR 280, NIRC the court made the following relevant observation: *"Suppose that the employer says to the employee, 'Your job is finished. I will give you the opportunity to resign. If you don't, you will be sacked'. How, we would ask, is it possible to reach a conclusion other than that the employment is being terminated by the employer, even though the employee takes the first and more respectable alternative of signing a letter of resignation rather than being the recipient of a letter of dismissal? We feel that in such circumstances there really can be no other conclusion than the employer terminated the contract."*

127. Subsequently the courts have identified the issue which is at play here as one of causation - that is to say that where an employee resigns rather than being dismissed having been told if that if they do not resign they will be dismissed the cause of the resignation is the threat and therefore there is a dismissal.

128. This was made clear in the case of Sheffield v Oxford Controls Company Ltd [1979] IRLR 133 where it was said that: *"the causation is the threat of dismissal. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation later or to be willing to give, and to give, the oral resignation."*

129. As we have said these types of cases are highly fact specific however we think it is pertinent that in a more recent authority, Sandhu v Jan de Rijk Transport Ltd [2007] IRLR 519, the Court of Appeal surveyed the case law in this area and observed as follows: *'in none of the cases in which the employee has been held to resign has the resignation occurred during the same interview/discussion in which the question of dismissal has been raised, and in no case in which the termination of the employee's employment has occurred in a single interview has a resignation been found to have taken place. The reason for this, I venture to think, is not far to seek. Resignation, as the authorities indicate, implies some form of negotiation and discussion; it predicates a result which is a genuine choice on the part of the employee. Plainly, if the employee has had the opportunity to take independent advice and then offers to resign, that fact would be powerful evidence pointing towards resignation rather than dismissal.'*

130. This identifies that if an employee is given time to think about their decision and to have the opportunity to take advice and that if there is some

form of negotiation and discussion over a way forward at those may well be factors which point away from dismissal.

131. We consider that the situation which is before us which is that the claimant was invited to accept demotion on substantially reduced terms and conditions or alternatively he would be dismissed without notice is analogous to the situation where an employee is told that they have an alternative of dismissal or resignation.

132. We therefore consider whether in the circumstances of this particular case what happened was in effect a dismissal applying the principles which we have set out above.

133. We find that the claimant was dismissed.

134. In our judgement the causation in this case is in fact extremely clear. The claimant only said he would be demoted because of the threat of dismissal without notice which was put to him immediately before he was invited to make his decision. In effect the presentation of the alternative in this case was an ultimatum. It was made crystal clear to the claimant that if he did not say he agreed to be demoted then he would be dismissed with immediate effect without notice.

135. It is highly relevant in our judgement that that option was presented to the claimant in circumstances of extreme time pressure in that he was given only 15 minutes, subsequently extended to 25, in which to make his decision. There was no opportunity given to the claimant to take advice or to consider what he wanted to do in any detail. The claimant was we consider in a highly vulnerable position having just been told that after 20 years good service he would be summarily dismissed. He was in no position to negotiate terms or an outcome which was more favourable to him.

136. Indeed the presentation of the respondent's decision we think made it clear that no further discussion was available. The reality of the meeting on the 30th of September was that the points the claimant made in his written document were effectively ignored and the respondent was focused only on communicating its decision to the claimant - which was in fact the decision made in advance of the meeting that the claimant was guilty of gross misconduct and should be summarily dismissed.

137. Therefore the only option available to the claimant was to select the least bad outcome of the two options which were presented to him. That was what he did. He was given no option but to make that decision at the same meeting in which the respondent had made it clear that he would be summarily dismissed if he did not agree to the demotion.

138. We also consider it is salient to look at the surrounding circumstances . Shortly after the meeting the 30th of September the claimant appealed against the disciplinary outcome and as part of that process he made it very clear that he did not agree with the outcome which had been reached. The claimant then

went through ACAS early conciliation and made an in time claim for unfair dismissal arising out of the events of the 30th of September.

139. In our judgement then the claimant's actions after the meeting also indicated that he had not in reality agreed to the substantial variation in his terms and conditions.

140. In our judgement there is no meaningful evidence in this case of a genuine agreement to vary the claimant's terms and conditions. It was not in our view an agreement but in reality it was a unilateral decision by the respondent.

141. It was the respondent who really terminated the claimant's employment contract. We therefore find that the claimant was dismissed.

142. There is no question of the claimant being said to have affirmed the contract because this was a scenario in which the claimant's contract came to an end on 30 September and he was immediately engaged under a new contract. It was the new contract which the claimant worked under as an operator until he took voluntary redundancy in June 2020.

Reason?

143. We next consider what the reason for the dismissal was.

144. The respondent has satisfied us that the reason for dismissal was the claimant's conduct.

145. We consider that the respondent and Mr Osin in particular genuinely believed that the claimant had failed to follow the standard operating procedure on the night of 3rd of September.

146. Having said that we regret to say it appears to us that Mr Osin failed to properly address his mind to what it was that the claimant did or didn't do which constituted serious negligence and amounted to a breach of the respondent's procedures. We next consider the question of whether the claimant's dismissal for conduct was fair or unfair, and we deal with this concern as part of our assessment of fairness.

Fair?

147. We applied section 98 (4) Employment Rights Act 1996. We reminded ourselves of the cardinal rule which is that we must not substitute our view for that of the employer rather we must consider whether the respondent acted at all times within the range of reasonable responses.

148. We considered the question of whether the respondent had reasonable grounds for its belief in the misconduct. We found that they did not. We find that for the following reasons.

(i) Firstly the respondent did not make any findings as to the events of the night of 3rd of September which led to the claimant making the mistake of placing the wrong reels on the tail ends.

(ii) Secondly the respondent failed to identify the part of the standard operating procedure which the claimant was alleged to have failed to follow.

(iii) Thirdly the respondent failed to identify how the claimant was alleged to have failed follow the procedure.

(iv) Fourthly the respondent appears to have ignored the claimant's explanation that the reason why the error occurred was because the person who he was shadowing as part of his training had handed him the reel and then inappropriately left him to get on with the splicing on his own. As we have said that explanation suggests a low degree of culpability on behalf of the claimant.

(v) Fifthly the respondent appears to have ignored the evidence which strongly suggested thought the claimant was not fully trained up at the time of the incident including that he had never been shown the standard operating procedures by his trainer and that he should not have been left to complete the task on his own. Again those matters suggested a low degree of culpability on behalf of the claimant.

149. Taking those matters together we conclude that the respondent did not have reasonable grounds for its belief that the claimant was seriously negligent by reason of failing to follow the procedures on the night of 3 September.

150. We should also observe that a key part of Mr Osin's rationale for dismissal was that the claimant acted deliberately in choosing not to follow the procedures. There was simply no evidence of that and therefore the respondent cannot have had reasonable grounds for that particular belief.

151. We find that the respondent failed to conduct a reasonable investigation.

152. It seems to us that a reasonable investigation into an allegation of negligence by reason of a failure to follow the procedures on a specific night would clearly establish the facts of what actually took place on that night. This investigation never did that.

153. It also seems to us to be manifestly clear that a reasonable investigation would necessarily take evidence from the person who the claimant was working alongside on the night in question and in fact was shadowing at the time the incident took place and that was Amir. Amir was the obvious person who could shed light on what had occurred and whether the circumstances of the mistake really suggested gross negligence on the part of the claimant.

154. The respondent even failed to interview Amir when the claimant explained that it was Amir who had actually handed him the reel to be spliced and that was why he believed it was the correct one. We think any reasonable employer would have interviewed Amir in light of that evidence to check whether or not what the claimant was saying was correct and if it was to consider how this affected the level of the claimant's culpability.

155. In assessing fairness we took into account the arguments raised by the claimant's wife during this hearing. We think the point has been well made by the claimant's wife that mistakes do happen on production lines and sometimes those mistakes result in losses for the respondent. However it does not automatically follow that any such mistake must be down to serious negligence justifying dismissal on the part of an employee.

156. The case of Peter Thompson is a striking example put forward on the claimant's behalf where it appears that a mistake of a similar nature to that made by the claimant was made by Peter Thompson but an investigation was inconclusive as to whether it was really Peter Thompson's fault and therefore no disciplinary action was taken. What this demonstrates to our mind is the necessity in order to act reasonably to investigate and consider the circumstances which have led to a mistake being made in order to make a fair assessment of whether the employee is so at fault as to justify a finding of serious negligence and dismissal. We would suggest that is particularly incumbent on a reasonable employer to do that when it is dealing with an employee who has provided the employer with nearly 20 years good service.

157. We think the reality of this case is that the decision makers made an assumption that the mistake must have arisen by reason of serious negligence and a failure to follow the procedures without addressing their minds as to what the negligence actually was and how it was meant to have occurred. This is very clearly demonstrated by the fact that nowhere in the respondent's process was the relevant breach of the operating procedure identified.

158. For those reasons when we turn to address the ultimate question of whether the sanction of dismissal fell outside the range of reasonable responses we find that it did fall outside of that range. We shall therefore find the claimant was unfairly dismissed by the respondent.

Discrimination?

159. We next turn to consider the claimant's claims of direct age and race discrimination.

160. We remind ourselves of the burden of proof provisions in the Equality Act 2010 ("EA"). Section 136(2) Equality Act 2010 sets out the applicable provision which we have taken into account.

161. The first stage of that process requires the claimant to prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination, absent any other explanation.

162. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act.

163. It is well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. This is not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

164. Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular the case of Bahl v The Law Society and others [2004] IRLR 799).

165. Before the burden can shift there must be something to suggest that the treatment was due to the protected characteristic – in this case race and or age (see B and C v A [2010] IRLR 400).

166. As was said by the EAT in Chief Constable of Kent Constabulary v Bowler EAT 0214/16*: 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'*

167. Our essential finding in this case is that the claimant has failed to discharge the initial burden of proof. The claimant has failed to prove any facts from which we could conclude absent any other explanation that the reason for his treatment was either race or age.

168. As a non-professional representative we gave the claimant's wife every opportunity to explain the claimant's case as to why he considered that his treatment may have been down to race or age and prompted her to ask relevant questions about it. Despite that additional assistance our finding is that the claimant has not come anywhere close to proving the initial case. We do not think there is any evidence at all before us that the reason for the claimant's treatment could have been age or race.

169. Although the claimant put forward a number of comparators we did not find that there was anyone who could truly be said to be in the same situation as the claimant and the question of comparators was of limited assistance in a case where there was in reality no evidence of anything to suggest that the reason for the claimant's treatment was race or age

170. For clarity these are our findings on the specific allegations of direct discrimination:

170.1 The claimant was suspended however we find the reason for suspension was a belief in misconduct.

170.2 We agree that the respondent failed to conduct a thorough investigation however there is nothing to suggest that this could have been because of race or age rather we think this was down to procedural failings on behalf of the respondent.

170.3 It is correct that the claimant was refused permission to have his wife accompany him at the disciplinary meeting. This was because in the respondent's procedures an employee is permitted to be accompanied by a colleague or trade union representative. This decision therefore had nothing to do with race or age

170.4 We do not agree that Mr Osin was aggressive, condescending, sarcastic or bullying or that he mocked the claimant. Our findings demonstrate that we think Mr Osin got things wrong but there was nothing to suggest this had anything to do with race or age.

170.5 There was a delay between the disciplinary hearing and the claimant receiving the outcome and the notes. There is no evidence to suggest this might have had anything to do with race or age

170.6 We do not find that Helen Davis was condescending, unhelpful, offhand or rude. We did not see any evidence to suggest that Helen Davis' attitude towards the claimant may have been because of race or age.

170.7 We do not accept that Mr Osin took into account the claimant's supervisor saying that he was not a good worker. There was no evidence that he had done so; it was pure speculation on the claimant's part. Moreover if Mr Osin had done that there was nothing to suggest it had anything to do with race or age.

170.8 We accept that Mr Osin failed to take into account that the claimant was training on the line at the time of the incident and we would say that any reasonable employer would have taken that into account. However there is nothing to suggest that that failure had anything to do with race or age.

170.9 Mr Osin did find the claimant guilty of gross misconduct and found that he should be dismissed or alternatively demoted. We find that Mr Osin did that because of his belief that the claimant had committed gross misconduct. There is no evidence to suggest this had anything to do with race or age.

170.10 We do not agree that the claimant was given only 10 minutes to decide whether to accept demotion. We found that he was initially given 15 and that was then extended to 25. There is no evidence that this had anything to do with race or age .

170.11 Helen Davis did refuse the claimant's request for his supervisors to attend the appeal hearing. There is no evidence this had anything to do with race or age.

170.12 Mr. Brown did uphold the disciplinary sanction and findings. There is no evidence that his decision was influenced by race or age.

170.13 The claimant was required to attend the meeting on the 22nd of November and he was warned that he might lose his sick pay if he did not attend. We do not find that Helen Davis disclosed the claimant's occupational health notes to Tony Wilkins in breach of data protection rules. We do accept however that Tony Wilkins was present at the meeting and therefore would have heard some information regarding the claimant's illness and his involvement with occupational health and we accept that this concerned the claimant. There is no evidence that any of this had might have had anything to do with race or age.

170.14 Caroline Gionis and Kate Holland did not allow the claimant's wife to accompany him to the investigation meeting and this was for the same reason as explained previously. It had nothing to do with race or age.

170.15 We do not accept that Mrs Gionis or Mrs Holland were not independent. There is no evidence to suggest that they were biased against claimant.

170.16 We did not agree that the grievance process was not followed

170.17 The reason why the claimant's grievance was delayed was because as we've explained he declined to agree the notes or attend the meetings. There is no evidence that the approach of Mrs Gionis or Mrs Holland or the grievance process generally had anything to do with race or age.

171. We therefore conclude that the respondent did not treat the claimant any less favourably because of race or age. The claimant's direct discrimination claim therefore must fail and be dismissed.

Victimisation?

172. We turn finally to consider the claimant's victimisation claim.

173. The claimant relied on four alleged protected acts. We find that only the fourth of these is in fact a protected act. That was the claimant presenting his claim to the employment tribunal on the 26th of January 2020.

174. The claimant also relied on his grievance which was submitted on the 1st of December 2019 but there is nothing in that grievance which could possibly make it a protected act. It is simply a complaint specifically about the respondent's conduct in the meeting of the 22nd of November.

175. The claimant also alleges that he did protected acts on the 30th of September 2019 during the disciplinary hearing and on the 4th of October 2019 when he wrote to the respondent. In relation to those matters the claimant did use the words discrimination and victimisation. However it is clear when reading the documents in full that the claimant is not actually doing anything by reference to the Equality Act and in particular he is not suggesting that he is being treated differently due to any protected characteristic or because he has done a protected act. Rather he is simply making the point that he believes other people have not faced disciplinary proceedings for making similar mistakes on the production line. What the claimant is doing therefore is making a complaint of inconsistency rather than making a complaint or doing anything by reference to the Equality Act.

176. The claimant had a number of complaints of detriment which overlapped to some extent with his complaints of discrimination. All of the allegations of detriment pre date the protected act of presenting a claim to the employment tribunal. It therefore cannot be the case that any alleged detriment was done because the claimant did the protected act. There was no evidence that the respondent believed the claimant may do a protected act and we do not think the claimant put his case in that way. Therefore all of the claimant's claims of victimisation must fail.

177. In any event we must record that even if we had found that the claimant's communications of 30th of September, 4th of October and 1st of December were protected acts there was again no evidence from which we could conclude that the reason for any of the claimant's treatment was the protected acts.

178. For completeness we will record our findings in relation to the allegations of detriment which we have not covered already in our findings on discrimination.

178.1 We do not find that the claimant was subjected to a high level of contact from Helen Davis in the period October 2019 to January 2020. The claimant was in this period signed off with work related stress and he also initiated a grievance. It was therefore necessary and reasonable for there to be some contact from the respondent's HR department regarding both his sickness absence and his grievance. We do not think there is any detriment here and there is no evidence that the contact had anything to do with any alleged protected act.

178.2 It is correct that the respondent sent information to the claimant by taxi on two occasions. The claimant describes the information as confidential however it is agreed that the information was contained in a sealed envelope. It is not suggested that the information was seen by anyone other than the claimant and it is not suggested that the communications were tampered with. We therefore do not think there is any detriment here and there is no evidence that this had anything to do with any alleged protected act. The reason why the information was sent by taxi was so the respondent could be assured that it would be delivered quickly as the information was in relation to time sensitive matters such as imminent meetings.

178.3 The claimant was found guilty of serious negligence and gross misconduct. This was a detriment. However the reason for it was the respondent's genuine belief in the claimant having committed gross misconduct. There is no evidence that this had anything to do with any alleged protected act.

178.4 We have found that the respondent did dismiss the claimant and this did give rise to the claimant suffering a reduction in salary. We have characterised this as an unfair dismissal rather than a breach of contract but the claimant has nevertheless suffered losses. This is a detriment however there is no evidence to suggest that this had anything to do with any alleged protected act rather it was done because of the respondent's belief that the claimant had committed misconduct.

179. The claimant was not subjected to any detriment because he had done a protected act. We therefore conclude that the victimisation claim must fail and be dismissed.

Overall conclusion

180. Our overall conclusion is therefore as follows

180.1 The claimant was unfairly dismissed by the respondent.

180.2 The claimant was not discriminated against because of his race or age by the respondent.

180.3 The claimant was not victimised within the meaning of the Equality Act by the respondent.

Remedy

181. Following our liability judgment we discussed remedy issues with the parties and heard submissions. We now give this further judgment on the remedy issues identified for us to determine.

182. The parties agreed that the claimant should be awarded a basic award and a compensatory award for the period between 30th September to the 30th June 2020.

183. The claimant argued that his compensatory award should continue beyond 30 June 2020. The respondent argued that the claimant's basic and compensatory awards should be reduced because of his conduct and his compensatory award should be further reduced on Polkey principles, i.e. to reflect the percentage chance that he would have been fairly dismissed in any event. These matters were disputed.

184. The agreed figure for the basic award was £14,962.

185. The total figure for the agreed part of the compensatory award was agreed to be £3,396.05. That figure was based on the difference between the claimant's earnings as an operator compared to what he would have earned had he remained in post as a team leader in the period to 30 June 2020.

186. Mr Hartley confirmed that the only basis on which the respondent sought a deduction to the claimant's basic award was his alleged contributory conduct. It was therefore agreed that there were three remedy issues for the Tribunal to determine and they were as follows:

186.1 Should the claimant be compensated for his loss of earnings post his voluntary redundancy on the 30th June 2020.

186.2 Should there be a Polkey reduction to the claimant's compensatory award.

186.3 Should there be a reduction to the compensatory and basic awards on the basis of the claimant's contributory conduct.

187. Our findings on those matters are as follows.

188. We decided that the claimant should not be compensated for any loss of earnings post his voluntary redundancy on the 30th June 2020. In making that assessment we have applied Section 123(1) of the Employment Rights Act 1996 which provides as follows: *"The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

189. The reality in this case was that the claimant had continued to work for the respondent for some 9 months post his demotion before applying for voluntary redundancy. For part of that period he had been signed off sick and for another part of that period he had been furloughed. Nevertheless, there was a period of a number of months where the claimant was in work and performing his shifts for the respondent.

190. We accept that in that period the claimant would have felt uncomfortable at work in light of what had happened regarding his demotion but on the evidence before us we cannot say that there was anything more serious than that. In particular there is no evidence of any repeats of the situation which occurred in October 2019 when the claimant experienced a panic attack and had to go home.

191. Evaluating all the evidence and submissions put before us it was clear to the Tribunal that the claimant had chosen to apply for voluntary redundancy at the time he did because it suited him to take redundancy at that particular time.

We have no doubts that a particular consideration for the claimant was the favourable terms on which he could leave the respondent's employment if he left under the reason of redundancy. That was due to the claimant's long service with the respondent which has entitled him to a substantial redundancy payment.

192. Taking those matters into account we do not think that the claimant's loss subsequent to his decision to apply for voluntary redundancy can truly be said to be in consequence of the dismissal of the 30th September. Similarly, it is not in our judgement something than can be said to be attributable to any action of the employer. Rather it was in our judgement attributable to the claimant's decision which we found was taken for his own reasons to apply for voluntary redundancy and it was in consequence of that decision and that decision alone.

193. Regarding contributory conduct we have had to consider whether the conduct of the claimant was culpable or blameworthy in the sense that it was foolish or perverse or unreasonable in the circumstances and if so whether it caused or contributed to the dismissal and whether it is therefore just and equitable to reduce the assessment of the claimant's loss. We have borne in mind that contributory conduct in this context includes conduct which may fall short of gross misconduct and it need not necessarily amount to a breach of contract.

194. We do not see any conduct of the claimant on the evidence which has been placed before us which crosses the threshold to reach contributory conduct in that sense.

195. We have to reflect at this stage on our liability findings and in particular an important finding which was that the respondent had failed to adequately investigate the charge which it laid against the claimant and in particular it had failed to adequately particularise and identify the negligence which the claimant was supposed to be responsible for. We refer in particular to our finding that the respondent never identified the relevant breach of the procedure which the claimant was said to have been responsible for.

196. There is no evidence put before us to contradict the claimant's account of how he made the mistake on the night of the 3rd September. We refer to our liability finding that the claimant set out a clear account of what had taken place which involved the person who he was shadowing, Amir, handing him the reels to place onto the tail ends and because the claimant had been handed the reels by Amir he believed that they were the correct ones.

197. As we pointed out during our liability judgement the respondent does not appear to have ever contradicted that account and it never tested it by interviewing Amir. We accept the claimant's account as the most likely account of what took place. On that account we could only access the level of culpability

of the claimant as being very low. In fact we do not see any blameworthy conduct in that account by the claimant. This is because the claimant was being trained up by Amir at the time this incident took place and he was specifically assigned to shadow Amir on the night in question. We do not see how it can really be said that the claimant's conduct was blameworthy when the person he was shadowing had handed him the reels to splice which turned out to be the wrong ones.

198. We have also considered the wider points regarding the claimant having admitted to not reading the standard operating procedures and in particular to not having read them on the night in question. We bear in mind first of all that the claimant was returning to work after a significant period of absence to a line which he was new on and that he was assigned on that night to shadow Amir. It is plain from the evidence we referred to in our liability judgment that the claimant should not have been left to splice on his own. This was not a case of an employee being left to his own devices to read the procedures and apply them. Rather he was reliant on his mentor and the person he was shadowing to "show him the ropes" – in other words it is clear that he was learning on the job.

199. In that context it is relevant that the claimant's training mentor had admitted that she had not shown him the standard operating procedures at any stage. Similarly, there is no suggestion that Amir had ever shown the claimant the standard operating procedures. We think that reflects a difference between how the level of management who considered the claimant's misconduct viewed the procedures and how they were viewed on the factory floor. In practice we do not think those working on the production line ever took it upon themselves to read the procedures, instead it was about learning on the job and repeating what you had been shown. This is reflected in the fact that the claimant was never shown the procedures by his training mentor or by Amir and the fact that the claimant appeared genuinely perplexed by the suggestion that he should have taken it upon himself to read the procedures. There was no evidence that this was ever suggested to him as part of his training or that he was ever given the time to do so.

200. In that context we do not think that a failure to take time out to read the procedures can be said to be blameworthy conduct in the sense that we have just identified. The suggestion seemed to be that the claimant should have taken time to go through the procedures rather than accept the reel which he had been handed by the person who he was shadowing. We think that is unrealistic. In fact, it is hard to see how any other operative in the circumstances which the claimant found himself in could have acted in any other way than the claimant did. We find it difficult to imagine that any employee would effectively have refused the invitation to place the reel on by Amir and instead gone to read the standard operating procedures. We do not think that the claimant's failure to do that can be said to be foolish, perverse, unreasonable or

blameworthy in the circumstances. The claimant's behaviour instead appears to have been entirely what one would expect from an employee who was learning on the job in an unfamiliar process by shadowing another operative.

201. Regarding Polkey, we find ourselves largely in agreement with Mr Hartley's submissions and we think a Polkey reduction is appropriate.

202. Mr Hartley realistically acknowledged that in light of our liability findings the respondent had much work to do to adequately investigate this incident. But there was, nevertheless, a percentage chance that if that work had been done it could have identified that the claimant was responsible for breaching the procedures and therefore for the loss which the respondent incurred. None of the evidence which we have heard necessarily excludes that as a possibility and therefore we think it is right to make Polkey reduction.

203. We must take into account however, and as Mr Hartley rightly accepted, that the deficiencies in the investigation were substantial. In particular the respondent made the glaring error of failing to interview Amir and we still do not know what his evidence would have been. We could not safely say that there was a high chance that further investigation would have identified negligence by the claimant.

204. We concluded that a relatively low Polkey reduction was appropriate. We decided to make a 15% reduction to the claimant's compensatory award to reflect the percentage chance that he could have been fairly dismissed.

205. Our judgment will therefore reflect the agreed figures and our findings on the disputed matters.

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Employment Judge Meichen 20 October 2021

Sent to the parties on:

27/10/2021
For the Tribunal: