



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

MR B FERNANDES

AND

Respondent

ROYAL MAIL GROUP LTD (R1)

MR N RANA (R2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 11TH / 12TH / 13TH / 14TH / 15TH / 18TH / 19TH
OCTOBER 2021

EMPLOYMENT JUDGE MR P CADNEY

MEMBERS:

MR J SHAH MBE

MS J KAYE

APPEARANCES:-

FOR THE CLAIMANT:- MR P O'CALLAGHAN (COUNSEL)

FOR THE RESPONDENT:- MR S PEACOCK (SOLICITOR)

INTERPRETER:- MS L DE OLIVEIRA (LANGUAGE –
KONKANI)

DRAFT JUDGMENT

The unanimous judgment of the tribunal is that:-

The claimant's claims against the first respondent of:

- i) Direct race discrimination;
- ii) Harassment;

iii) Victimsation

iv) Unfair Dismissal

are dismissed.

The claimant's claim against the first respondent of:

- i) Failure permit him to be accompanied by a representative of his choice at a disciplinary meeting on 19th July 2019 contrary to s10 (2A) and 11(1) of the Employment Relations Act 1999 is well founded and is upheld.
- ii) No award of compensation is made.

The claimant's claims against the second respondent of:

- i) Direct race discrimination;
- ii) Harassment;
- iii) Victimization

are dismissed.

Reasons

1. By this claim the claimant brings claims of race discrimination (direct discrimination, harassment, and victimisation) in claim 1404004/19 against both respondents; and unfair dismissal and the failure to permit him to be accompanied by a representative of his choice at a disciplinary meeting on 19th July 2020 in claim 1400556/2021 against the first respondent. All of the discrimination claims are alleged to have been perpetrated by Mr Rana (R2) who is alleged to have been the servant or agent of the first respondent. The first respondent is not relying on the statutory defence and so if the allegations are made out against the second respondent the claimant will also succeed against the first.
2. We have heard evidence for the claimant from the claimant himself, Mr Erasmo Gonsalves, Mrs Nancy Fernandes, Mr Jose Manuel T Rodrigues, Mr Edwin Rodrigues, Mr Urbano DeSousa, Mr Christopher Novaes, Mr Paulo Fernandes, and Mr Maximilian Gondo.
3. For the respondents we heard evidence from Mr Nadeem Rana, Ms Kerry Callow, Mr Adam Coles, Mr Andrew Radbourne, Mr James King, Manjit Sandhu and Ms Anita Madden.

Background/Summary

4. The claimant was employed by the Royal Mail on the late shift at the Swindon Royal Mail Centre. He has Portuguese nationality, but is from Goa in India and describes himself as Indian Goan. His immediate line manager was Mr James King, and Mr Nadeem Rana (R2) was the Late Shift Manager, and had overall managerial responsibility for the late shift. The late shift comprised approximately 180 members of staff and Mr Rana's evidence was that some 65-70% were Indian or of Indian origin. Mr Rana describes himself as British Indian – Pakistani. He was born in England and is British but his father is Indian and his mother Pakistani.
5. The specific allegations will be dealt with below but the fundamental basis of the race discrimination claims is that Mr Rana (whom the claimant and his witnesses consistently describe as "Pakistani") is prejudiced towards and favours non-Indian employees (there are allegations for example of favouritism in providing promotion or promotion opportunities for "white British" or other "Pakistani" employees), but is prejudiced against and discriminates against "Indian" employees.
6. The claimant lodged a first grievance about allegedly discriminatory behaviour by Mr Rana in July 2019, and a second in September 2019. Those allegations form the basis of the discrimination claims in this case. The respondent investigated and the investigating officer Mr Anderson concluded that the grievances were unfounded. The grievance appeal officer Mr Dan Williams dismissed the claimant's appeal and concluded that the allegations had been made in bad faith, and referred them for consideration of disciplinary action. The disciplinary officer Mr Sandhu formed the same view and dismissed the claimant for gross misconduct, against which he unsuccessfully appealed.
7. The claimant's case is that the allegations are true, or that at the very least he believes them to be true and made them in good faith; and that it was not reasonably open to the respondent to hold otherwise and dismiss him.
8. The respondent essentially submits that the claimant's complaints amounted to a baseless campaign against Mr Rana of which these proceedings are a continuation; and which is itself fundamentally racist and discriminatory as it involves and is based on assumptions about Mr Rana based solely on his perceived nationality or ethnicity as "Pakistani". Those conclusions were not simply reasonably open to the respondent but were demonstrably correct both on the evidence before it at the time and that adduced in the tribunal hearing.

Evidence / Claimant's Supporting Evidence

9. Before dealing with the facts relating to the specific allegations it is necessary to say something about the claimant's supporting evidence. A number of the witnesses give evidence which does not relate to the specific claims in this case but which make

further allegations of unfair and discriminatory treatment of “Indian” employees by Mr Rana; and of a “deal” between Mr Rana and two CWU representatives (Mr L de Sousa and Mr M Colaco) which led to them supporting Mr Rana and not the claimant. The claimant contends we are entitled to take this evidence into account in drawing inferences as to whether the claimant’s treatment by Mr Rana was discriminatory. The obvious difficulty with that is that (with one exception) none of those allegations have been adjudicated upon. Effectively the claimant invites us to assume that those allegations are factually true and having made that assumption to further assume that they were acts of discrimination, from which assumptions we should infer that Mr Rana’s treatment of the claimant was discriminatory. This appears to us wrong in principle, and that we cannot draw inferences from allegations that have not themselves been tested.

10. We have summarised each of the claimant’s witnesses’ evidence in relation to matters not specifically before us and which in our view we do not have sufficient evidence to make findings of fact or draw any conclusions below (Christopher Novaes and Paulo Fernandes gave evidence in respect of the specific issues before us) :-
- i) Mr Erasmo Gonsalves – He gives evidence of discrimination by Mr Rana at Christmas 2015, of his suspending five “Indians” in 2017 ; that he demoted an Indian lady Molly Pereira whilst promoting a white British woman; and of promoting and supporting Pakistani nationals.
 - ii) Mrs Nancy Fernandes- She is the wife of Mr Gonsalves and also makes an allegation of discrimination relating to Christmas 2015 and allegations relating to Mr Rana and a Mr Ansar (who it is alleged is also “Pakistani”) between January and August 2016. In the course of her evidence when asked why she believed Mr Rana discriminated against her she stated that it was because he was “Pakistani”.
 - iii) Mr Jose Manual T Rodrigues – He is a senior shop steward for the CWU, and makes allegations against Mr Rana of giving Pakistani Muslim employees preferential treatment in giving time off for Eid than he gave Christian Indian Goan employees in respect of Christmas; of promoting Pakistani employees whilst discouraging or preventing Indian employees from being promoted. In evidence he accepted that some Indian employees had been promoted but that they had been “forced” into doing so. In evidence he accused two of his colleagues (both CWU representatives) Mr de Sousa and Mr Colaco of having done some form of deal with Mr Rana which led to them permitting and collaborating in discrimination against Indian employees.
 - iv) Mr Edwin Rodrigues – He brought claims of race discrimination which although factually different were also based on allegations against Mr Rana which were dismissed at a hearing in April 2021 heard by EJ Reed and members. Despite those claims having been dismissed he was still called by the claimant and maintained that the allegations were true.

- v) Mr Urbano de Sousa – He has a claim before the tribunal ,which on the information before us has not yet been heard and it would not be appropriate for us to determine any issues in relation to it.
- vi) Mr Maximilian Gondo – His evidence relates to Mr L de Sousa; and he describes Mr Rana as being able to get away with bullying Indian employees as he is always supported by Mr de Sousa.

Facts / Discrimination

11. As is set out above the claimant was employed on the late shift, and all the allegations relate to his alleged treatment by the Late Shift Manager Mr Rana.
12. The first allegation in time relates to the claimant's attendance on a training course, due to take place on 17th/18th July 2019. It is expressly an allegation against Mr Rana.
13. In or around the end of April 2019 the respondent underwent a resign (essentially a re-allocation of duties) during which the claimant signed for "reserve duty" . This meant he would need to be able to cover any duty across the whole of the mail centre and be able to operate any of the machines. In order to do this he would need to be trained on any machine that he had not already been trained on. One of these was the iLSM (intelligent letter sorting machine). The evidence of Mr Coles is that training courses for one quarter needed to be booked in the previous quarter and so the dates for iLSM courses were requested in or about April 2019. The claimant was due to be on annual leave in August 1019 when he was originally due to attend iLSM training. On 11th July 2019 Ms Callow spoke to and emailed Mr Rana to ask whether she could bring forward Mr Fernandes attendance to the course the following week; and that same day she emailed the central training team to request his name be added to that course. It is not in dispute that the letter from the central training team to the claimant was sent on 15th July and received by him on the 16th July, with less than 24 hours' notice. The respondent asserts that until this point Mr Rana had played no part other than to be informed by Ms Callow of her intention, and was on any analysis not responsible for any delay in notifying the claimant between 11th and 15th July. In evidence the claimant disputed this contending that he believed that Mr Rana was responsible, and somewhat bizarrely that the Ms Callow and Mr Coles were lying. There is no evidence in support of the allegation that Mr Rana played any part in inviting the claimant to the training or the timing of the letter; and we accept the evidence of Ms Callow and Mr Coles as to the process by which that occurred.
14. The second allegation is that Mr Rana threatened the claimant with disciplinary action in a "hostile and intimidating way". There is no dispute that on 16th July when he received the letter the claimant approached his line manager Mr King. There is a dispute about precisely what was said. The claimant asserts that he did not refuse to attend the course but said he did not want to at short notice; Mr King's evidence is that he did not mention anything about short notice but that he was refusing because

he was already trained in CFC and T2K sections and did not want to be trained on iLSM as well. Mr King's evidence is that he told the claimant that he had picked a reserve role and had to be trained on each section. Mr King informed Mr Rana, and Mr Rana's evidence is that he spoke to the claimant re-iterating that as he had signed for reserve duties he had to be trained for all roles and he was required to attend, to which the claimant replied "okay". Mr Rana states that thereafter Mr Fernandes told him on four occasions that he would not attend as he had already been trained on the CFC and TOPS machines. The claimant contends that during these exchanges Mr Rana raised his voice and was aggressive.

15. There are differences in recollections as to the timing, but there is no dispute that at some point thereafter the claimant followed Mr Rana into his office and repeated that he would not attend the training. Mr Rana suggested that they be joined Mr De Sousa (the CWU rep) but Mr Fernandes objected and Mr Rana agreed at the claimant's request that Mr M Colaco (Mr de Sousa's deputy) join them which he did. Mr Rana's evidence is that he told Mr Fernandes, in Mr Colaco's presence, that if there was a medical reason for non-attendance that he could be referred to Occupational Health; and that consideration may have to be given to medical retirement; alternatively that if he was refusing for no good reason this would be treated as the refusal to comply with a reasonable managerial instruction under the conduct code; and that if he failed to attend there would be a "very serious conversation".
16. In a subsequent interview with Mr Anderson, Mr Colaco confirmed that the conversation lasted some five minutes, that both Mr Rana and Mr de Sousa had confirmed that the training was mandatory for reserves and that there was no shouting or raised voices.
17. It follows that the factual allegation that Mr Rana "threatened" the claimant with medical investigation and/or disciplinary action in the event that he did not attend the training is not in dispute, but it is not accepted that this was in a hostile or intimidating way. In essence it is the respondent's case that the refusal to attend a mandatory training course, despite being informed by his Shift Manager and union representative that his attendance was required, would be a serious matter with serious consequences; and that Mr Rana was perfectly entitled to impress this on the claimant.
18. The third allegation is that on 17th July 2019 that Mr Rana instructed Mr Radbourne to subject the claimant to intrusive monitoring at the training event. It is not in dispute that Mr Radbourne was also attending the training. His evidence is that at about 14.00 he was called by Mr Rana and asked to "round up" any missing candidates and to attend himself. He did not tell him specifically who to round up, and Mr Radbourne "rounded up" Penina Lusungu, Alison Murphy and the claimant. Put simply there is no evidence to contradict this; no evidence that Mr Radbourne subjected the claimant to any, let alone intrusive, monitoring whilst on the course and no evidence that if he had done so it was the result of an instruction from Mr Rana.

19. On 22nd July 2019 the claimant lodged a grievance in respect of these matters (which will be dealt with in more detail in relation to the unfair dismissal claim). It is not in dispute that it included an allegation of race discrimination and is a protected act within the meaning of s27 Equality Act 2010. The remaining allegations are of victimisation following this grievance.
20. The claimant contends that on the 10th /11th/ 13th and 19th or 20th September 2019 (the evidence before us is that the incident complained of took place on 19th September 2019 but nothing turns on the specific date) he was victimised by being required to work on the PSM machine. The evidence of Mr King is that at that time the claimant normally started his shift on the CFC machine, which is at the front end of the sorting process, and that that work would come to an end before the shift finished. As a result those working on the CFC machine would be allocated to other duties towards the end of the shift. There were eleven line managers who reported to Mr Rana, and who would contact each other over the radio to request more staff on a particular machine. Mr Rana would only become involved if a request was not answered, and was not involved in allocating any individual to any particular machine or duties. Mr King had no specific recollection of the 10th / 11th and 13th September 2019 but accepts that as the claimant was PSM trained that he may well have been transferred to work on it at the end of those shifts. However if that happened it would have been Mr King's decision and not Mr Rana's and the fact of the claimant having lodged grievance had no bearing on it.
21. The allegations relating to the 19th September 2019 are more specific. The claimant alleges that he was told by Mr King to go to the PSM machine, that he said he was going to use the toilet near to the CFC machine but was told by Mr King to use the one nearer the PSM machine and when he got to the PSM machine that M Rana who was working on it at the time looked at the claimant with hostility and "aggressively" threw a parcel into a sleeve of the machine. The claimant interpreted that as an act of physical aggression directed towards him. Mr King does not dispute that he directed the claimant to go to the PSM machine following a request from Mr Rana, but that Mr Rana had simply requested assistance and had not identified any particular member of staff. He also accepts that he directed the claimant to use the toilet nearest the PSM machine as the other toilet was in the opposite direction and that this is a well-known time wasting ruse.

Facts - Unfair Dismissal

22. As set out above the claimant lodged a grievance about the July complaints on 22nd July 2019 and the September allegations on 23rd September 2019. Investigatory meetings into the first grievance were carried out by Mr Thomas in August and September 2019. Given the nature of the grievance it was dealt with under the respondent's bullying and harassment Policy and Mr Roo Andersen was appointed to determine the grievance. There were meetings between the claimant and Mr Andersen on 10th October and 27th November 2019.

23. Mr Andersen gave his outcome on 2nd March 2020. The grievance was explicitly not simply about the events themselves but against Mr Rana himself. Mr Andersen did not uphold any of the grievances and concluded "*Mr Fernandes has no evidential case against Mr Rana and is clearly taking advice from an external advisor*" and "*I am happy on this occasion to conclude Mr Fernandes case was misadvised rather than in bad faith*", but "*In the event that Mr Fernandes choses to appeal I suggest we use an independent investigator .. and consideration into whether this case was truly brought in good faith if unfound again*".
24. The claimant appealed. The appeal officer was Mr Williams (the plant manager) who met the claimant on 30th March 2020 and gave his outcome on 13th May 2020. He dismissed the appeal and concluded that the allegations had been made in bad faith and should be considered for disciplinary action. In describing the appeal meeting he states "*.. Baptista Fernandes believed the sole reason why Nadeem Rana was a racist was because he was from the Muslim faith and he felt as Nadeem is Muslim he hates people from India due to the Indo-Pakistani conflict post 1947. To brandish Nadeem Rana a racist based on this not acceptable and suggests the racist complaint has been made in bad faith*", and this was the final conclusion he reached.
25. The respondent's Stop Bullying and Harassment Policy expressly provides that in the event that a complaint is held to have been made falsely or otherwise in bad faith that it will dealt with under the Conduct Policy. The first stage of the policy required a fact finding meeting. The fact finding meeting between the claimant and Miss Dooley took place on 22nd May 2020. In her meeting with the claimant the following exchange is recorded :
- GD – In the conclusion it states you saying “ All Muslims hate people from India” Where is your evidence for this?*
- BF- It's a country to country thing (in handwriting – humble request to do a Google search please)*
- JR (C's representative) No what she is saying is that all Muslims hate Indians*
- BF – Yes all Pakistanis, it is a country to country rivalry...All Pakistani Muslims hate Indians”*
26. Ms Dooley concluded that the potential penalties were above her level of authority and referred the matter Mr Sandhu for consideration of further action.
27. The claimant was then invited to a formal conduct meeting which finally took place on 24th August 2020 at which the claimant was represented by Mr Rodrigues, his CWU representative. An earlier meeting on the 19th July 2020 had not gone ahead as the claimant had attended with a representative Mr Fernandes from the GMB trade union. They are not recognised by the Royal Mail and Mr Sandhu understood that because of this he could not permit Mr Fernandes to represent the claimant. Mr Sandhu now accepts that his understanding was wrong and that he should have

permitted him to do so. Following the meeting with the claimant Mr Sandhu interviewed Mrs Fernandes, Mr Jose Rodrigues; Mr Rana, Edwin Rodrigues, and Mathias Colaco.

28. Mr Sandhu concluded that “*there was no substance to (the) allegations and that he had made them in bad faith.*” He concluded that the claim was based “*solely on a generalisation that Pakistani people hated Indian people and that that generalisation was itself racist.*”, and to make allegations based on it had to be considered an act of bad faith . He concluded that this constituted gross misconduct and that the appropriate penalty was summary dismissal.
29. The claimant appealed and the appeal was hear by Ms Madden (an Independent Case Manager). It was a rehearing and she formed her own views as to the misconduct and the appropriate sanction. Due the Covid restrictions in place at the time the appeal was dealt on the basis of write submissions Once she had received the claimant’s submissions she interviewed Mr Sandhu, Mr Williams , Mr Andersen, and sent further information to the claimant on which he subsequently commented in writing. Ms Madden also concluded that there was no evidence that Mr Rana’s actions towards the claimant had been motivated by race, but also that there was no evidence that could have allowed the claimant genuinely to believe that it was. She too concluded that the allegations had been made in bad faith, and also decided that summary dismissal was justified in the circumstances.

Law / Discrimination

30. There is no dispute between the parties as to the relevant law. The relevant sections of the Equality Act 2010 are set out below:-

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

26 Harassment

(1) A person (A) harasses another (B) if–

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of–

(i) violating B’s dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if–

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if–

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because–

(a) B does a protected act,

Conclusions / Discrimination

31. The first allegation is that Mr Rana on the 16th July 2019 required the claimant to attend the training event at less than twenty four hours' notice. Thus is alleged to be an act of direct race discrimination or alternatively harassment.
32. Direct race discrimination -. The respondent submits that as a claim of direct race discrimination the claim is bound to fail. Firstly there is no evidence that Mr Rana was involved in arranging the training or requiring the claimant's attendance or in the timing of the sending of the letter notifying him of it. Secondly requiring him to attend training on a machine on which he needed to be trained to perform his role cannot by definition be less favourable treatment. Even if the less favourable treatment is defined more narrowly as only giving twenty four hours' notice, that too cannot be less favourable treatment. The training was being provided at the claimant's normal place of work during his normal shift, and did not require any pre-preparation. Even if he had received no notice at all and had simply been informed at the start of the shift,

- as in fact happened to Mr Radbourne, all that he was being required to do was attend a training course during his normal shift at his normal place of work.
33. Even if the claimant had established that he was aggrieved or affronted by being given twenty four hours' notice the respondent there is no evidence of less favourable treatment judged against the appropriate comparator. The claimant has identified his comparators as Alison Murphy, Penina Lusingu, Elsie Falcao, and Arcangela Fernandes. There is actually very little evidence before us as to the timing of the notification given to those attendees, and the claim appears to be based on the assumption that they must have received more notice than the claimant, which at least in the case of Mr Radbourne is not correct. For completeness sake, the evidence before us is that Elsie Falco was notified by a letter dated 12th July and so would have had four days' notice; but Arcangela Fernandes letter is undated. The claimant and Penina Lusingu were only added to the course on 11th July and we do not have evidence as to when Penina Lusingu was notified. As set out above Mr Radbourne (who is white British) was given no notice at all.
34. Again even if he overcame that hurdle there is no evidence that Mr Rana was involved at all in the timing of the notification; and given that it is not alleged that the central training team perpetrated or were involved in any discrimination, if as a matter of fact the timing was the responsibility of the central training team the allegation is bound to fail against Mr Rana factually; and is bound to fail in any event as even the claimant does not allege that those who were in fact responsible for the timing of the notification had any conscious or unconscious discriminatory motive.
35. Harassment – Similarly even if the late notification is unwanted conduct within the meaning of section 26 the claim is bound to fail as there is no evidence (for the reasons set out above) that Mr Rana was involved or that it was related to race.
36. Put simply there is in our judgement no evidence to support the complaint that Mr Rana was involved in any way in the events about which the claimant complains and these complaints are bound to fail as a matter of fact.
37. The second allegation is that Mr Rana threatened the claimant with disciplinary action and in a hostile and intimidating way if the claimant did not attend the training on 17th July. This is also said to be either direct discrimination or harassment.
38. Direct discrimination - There is no dispute that the claimant was threatened with disciplinary action. Mr Rana's explanation, is that the claimant was refusing to attend a training course for no reason which was necessary for the performance of his role, and that training on machines was a health and safety issue as employees could not be required or permitted to work on machines on which they had not been trained, and training was for the benefit of the claimant and his colleagues. Requiring his attendance was a reasonable managerial instruction and refusal to comply would obviously be a disciplinary matter. The allegation that Mr Rana was hostile and intimidatory is disputed and not supported by the accounts given during the investigation by Mr Colaco.

39. Even if we accepted that Mr Rana had been hostile and intimidating in order to satisfy the first stage of the Igen v Wong test there would need to be primary evidence from which we could draw an inference that the less favourable treatment was because of race. Put simply there is none, other than the claimant's apparent belief in it; and in our judgment this does not satisfy the stage 1 test so as to transfer the burden of proof. Even if it had we accept Mr Rana's evidence that the reason for informing the claimant of the potential consequences of failing to attend was in order that he understood the seriousness of the consequences, and that any other employee who was refusing to attend a training course in the same circumstances would have been treated in the same way. In reaching that conclusion in our view it is notable that the claimant's trade union representative who was present had no complaints either about what was said to the claimant or how it was said.
40. Our conclusions are that we are not persuaded on the balance of probabilities that Mr Rana acted in a hostile or intimidatory manner; and that we accept that any employee refusing to attend the training course would have been treated identically. It follows that this claim must also be dismissed.
41. Harassment – Again even if we accept that being informed that a proposed course of conduct will lead to disciplinary action was unwanted conduct; there is no evidence whatsoever that it was related to the race for the same reasons, and this claim must also be dismissed.
42. The third allegation is that Mr Rana instructed Mr Radbourne to subject the claimant to intrusive monitoring during the training. If Mr Rana and Mr Radbourne's evidence is correct this is simply factually untrue. Both agree that the instruction given by Mr Rana to Mr Radbourne was to "round up" those who had not attended for the training at that point which Mr Radbourne did. Mr Rana did not mention the claimant by name and did not ask Mr Radbourne to do anything else. There is no evidence to contradict this and no evidence at all to support this allegation. We accept the evidence of Mr Radbourne and Mr Rana and this allegation fails on the facts.
43. Victimisation- As set out above it is not in dispute that the claimant performed a protected act within meaning of s27 in the allegations of discrimination set out in his grievance of 22nd July 2019.
44. Again this allegation is specifically against Mr Rana. In relation to requiring the claimant to work on the PSM machine on 10th / 11th / 13th September 2019 there is no evidence that the instruction came from Mr Rana at all. The respondent submits that in any event that it cannot be a detriment to require an employee to work for a short period at the end of their shift on a machine on which they are trained on and forms the part of the job they applied for.
45. In our judgement there is no evidence at all that Mr Rana had any involvement in Mr King's decisions and the allegations relating to these dates are bound to fail factually.

46. Similarly the evidence of Mr King is that although the request for assistance on 19th September did come from Mr Rana he did not request any individual employee and the decision to send the claimant was Mr King's. There has never been any allegation that Mr King committed any act of victimisation; and the claimant's case is that that in fact Mr King was explicitly requested to send him by Mr Rana. Once again there is no evidence at all in support of this contention, and it follows that it too must fail factually.
47. In relation to the allegation of Mr Rana subjecting the claimant to perceived physical abuse; the evidence from the claimant is that Mr Rana aggressively threw a parcel into a sleeve. There is no allegation that the parcel was thrown in the direction of the claimant or that at any point that he was in any physical danger. In our judgement here is simply no evidence that throwing a parcel into a sleeve was directed at the claimant at all or any evidence that would allow us to draw any causal link between this act and the grievance and this claim must also fail.
48. It follows that for the reasons given above the discrimination claims are dismissed against both respondents.

Conclusions

Unfair Dismissal

49. As this is a conduct dismissal there are four questions we have to answer. The first is whether the respondent has satisfied the burden of showing that the claimant was dismissed for a potentially fair reason. The claimant's case is that he was not dismissed because of a genuine belief in the misconduct, but in order to protect Mr Rana, to scapegoat him, and to discourage other Goan Indian employees from complaining.
50. We accept the evidence of Mr Sandhu and Ms Madden and in our judgement the respondent has satisfied the burden of demonstrating that the claimant was dismissed for a potentially fair reason.
51. The next questions are the Burchell questions – was there a reasonable investigation; were reasonable conclusions as to the misconduct drawn and was dismissal a reasonable sanction. The range of reasonable responses test applies to each of these questions.
52. In terms of the investigation the claimant contends that Mr Andersen should not have investigated the original grievance as he was a former work colleague of Mr Rana. However given that the claimant relies on his conclusion that the allegations were not made in bad faith this cannot have prejudiced the claimant. Secondly he makes the procedural point that Mr Fernandes (the GMB rep) was wrongly excluded from representing the claimant. This is obviously correct, but given that the claimant was represented at the meeting and given that there is no evidence before us that the

- claimant would have given any different account if represented by Mr Fernandes this too has not prejudiced him.
53. The primary challenge is as to the reasonableness of the conclusion that the allegations were made in bad faith. Whilst the respondent may have concluded that there was no evidential basis for them there is clearly a group of employees who all share the belief that Mr Rana discriminates against them. There was no reasonable basis for concluding that the claimant did not share this belief and no basis for concluding that the allegations were made in bad faith even if the respondent did not accept them.
54. The respondent submits firstly that given the total absence of supporting evidence that the conclusion that they were made in bad faith was necessarily open to Mr Sandhu and Ms Madden; as was the conclusion that they were made in bad faith because they were based on racist assumptions which was the conclusion drawn by Mr Williams, Mr Sandhu and Ms Madden. Given the claimant's willingness to repeatedly make allegations against Mr Rana based on no more than the fact that he was perceived be Pakistani, the conclusion of bad faith was reasonably open to them.
55. Finally the claimant submits that given his length of service, his clean disciplinary record and in particular that the disciplinary policy provides for the sanction of suspended dismissal accompanied by compulsory transfer that summary dismissal was unnecessarily harsh. In addition he points to the fact that had he not appealed Mr Andersen's original decision no further action would have been taken at all; and that in effect he has been dismissed for exercising his right of appeal and that at very least this should have reduced the sanction below that of summary dismissal. The respondent submits that dismissal clearly fell within the range of responses open given the finding that the claimant had made false claims in bad faith on a basis that was itself racist. If those conclusions were reasonably open to the decision makers that sanction was necessarily reasonably open to them.
56. We accept the respondents submissions and have concluded that the dismissal was fair.

Conclusions / S10 ERA 1999

57. There is no dispute that the claimant was not permitted to have the representative of his choice at the meeting on 19th July 2019 nor that this was a breach of s10 Employment Relations Act 1999. The tribunal is entitled to make an award of up to two week's wages. The respondent refers us to *Toal v GB Oils Ltd [2013] IRLR 619* in which the EAT held that where the employee suffered no detriment that a nominal award should be made and suggested £2. In this case in our judgment the claimant suffered the inconvenience of having to attend a further meeting but no substantive prejudice in presenting his defence to the disciplinary allegations. We are satisfied that in the award in those circumstances should be at most nominal. However in our

judgment (as set out below) the respondent is correct to describe the basis of that defence to the disciplinary charges as itself racist and in our judgement it would be wrong in principle to make an award to the claimant for the failure to permit representation by the representative of his choice in advancing and maintaining the truth of allegations which are themselves fundamentally racist.

“Campaign” against Mr Rana

58. Although not necessary for the resolution of any of the claims, which we have dismissed for the reasons give above, the respondent invites us to conclude that Mr Williams, Mr Sandhu and Ms Madden were correct and that the allegations were made in bad faith; and that these claims have been pursued in the tribunal despite the fact that the claimant cannot have had any reasonable belief in them or that they had any reasonable prospect of success.

59. There are a number of extremely troubling aspects of the claimant’s claims and the pursuit of this litigation:-

- i) Firstly in respect of a number of the claims there is no evidence that Mr Rana had any involvement at all. The claimant was prepared to assert as fact matters for which he had and has no evidence. To take simply the first allegation at the point at which it was first made there was no evidence at all that Mr Rana had any involvement. At the latest at the point of disclosure in this case, or at the very latest the exchange witness statements it must have been apparent to the claimant that not only was there no evidence that Mr Rana was involved in requiring his attendance on the training course, but that the timing of the notification lay entirely with HR Learning Services. Yet that allegation was pursued to the bitter end with no evidential basis.
- ii) Similarly it is very hard to see any rational basis for the claimant objecting at all given that the training was to be provided at his normal place of work during his normal shift. As the claimant accepts that prior this he had no dispute with Mr Rana it is difficult to see what he was complaining about or why he should attribute any complaint to Mr Rana anyway.
- iii) The most troubling feature is however the basis of the allegations of discrimination.

60. There are a number of occasions where the claimant makes the same point some of which are set out below. In his ET1 in claim 1404004/2018 the claimant states “The above acts of Mr Nadeem Rana are against me because I believed I am an Indian national origin and he is a Pakistani national and it is well known that Pakistan is the arc(h) rival of India”. He makes the same point at paragraph 6 of his grievance of 22nd July 2019. In the investigatory interview with Mr Anderson on 16th September 2019 he states

BF “ I honestly think Mr Rana is doing this because I am Indian”

RA "That is a very serious allegation, do you have any evidence of that"

BF "No but it is what I truly believe , the whole world knows Pakistan hates India"

RA "Are you saying you hate Pakistanis "

BF "No but they hate Indians, everyone knows."

In the appeal meeting with Mr Williams he states:

DW " So tell me why do you believe he is racist "

BF It is because he is from Pakistan and I am from India. There is a big rivalry and he hates us....

BF Nadeem is racist towards Indian people as he is from a Pakistani background (B1/222)

DW " Did he say anything to you and do you believe this act is racist

BF " He didn't say anything. Yes I believe it was racist due to his hatred of Indian people as he is a Muslim. I believe fully that Nadeem Rana pre-planned to abuse me with an act of physical abuse."

61. The respondent submits that the claimant's case is extremely problematic (indeed vexatious) as it is itself based clearly on stereotypical and racist assumptions about Pakistanis. The respondent submits there is no direct or even indirect evidence supporting any allegation of discrimination against Mr Rana. The whole basis of the claim against him is the proposition that he is Pakistani, or at least of Pakistani origin, and that it follows that he is inevitably prejudiced against Indians by reason of his ethnic or national origin, and that the allegation essentially proves itself; as the quote set out below illustrates:

"I honestly think Mr Rana is doing this because I am Indian –

That is a very serious allegation, do you have any evidence of that –

No but it is what I truly believe, the whole world knows Pakistan hates India –

Are you saying you hate Pakistanis –

No but they hate Indians, everyone knows."

62. In our judgement the respondent is correct to identify this as asserting stereotypical and fundamentally racist assumptions about Mr Rana. Mr Rana has in our judgement wholly unfairly and unreasonably been forced to defend himself both internally and in this tribunal against allegations for which there is simply no evidence and to do so on the basis of allegations about him which are themselves clearly themselves racist.

Employment Judge Cadney
Date: 22 October 2021

Judgment sent to the parties: 18 November 2021

For the Tribunal Office