EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr MA Evans	**v**	Genzyme Limited

Heard at: Bury St Edmunds (Hybrid hearing)

On: 04, 05, 06 and 07 October 2021

Before: Employment Judge Laidler

Members: Mr C Davie and Mr B Smith

Appearances
For the Claimant: Ms S Ismail (Counsel).
For the Respondent: Mr G Griffiths-Jones (Senior HR and Legal Adviser).

RESERVED JUDGMENT

1. It was reasonably practicable to have presented the unfair dismissal claim in time and as it was presented out of time the tribunal did not have jurisdiction to determine it.

2. If the tribunal were found wrong in that conclusion it would have found the dismissal for reason of conduct unfair in all the circumstances of the case. When it came to the issue of remedy there would be issues to be considered of causation and contribution and whether a fair dismissal would still have occurred.

3. It was just and equitable to extend time in relation to the claim of race discrimination.

4. The claim of race discrimination was not made out and dismissed.

RESERVED REASONS

1. The claimant commenced proceedings on 21 June 2019 following a period of ACAS Early Conciliation between 14 and 21 June 2019. He brought complaints of unfair dismissal, race discrimination and a claim for notice pay. The respondent defended the claims asserting that the claimant had been dismissed by reason of gross misconduct and that race played no part in that decision.

2. There was a preliminary hearing before Employment Judge Warren on 16 October 2019. Following that hearing an amended list of issues was produced which appeared in the tribunal bundle at page 52. A copy of that list is now set out below: -

Unfair Dismissal

1. The Respondent relies on the potentially fair reason of conduct.

2. Was the dismissal fair within the meaning of section 98(4), in particular:

   a. Did the Respondent have a genuine belief as to the relevant facts of the case?

   b. Did the Respondent sustain its belief upon reasonable grounds?

   c. Did the Respondent undertake as much investigation as was reasonable in all the circumstances?

   d. Did the Respondent undertake a fair process?

   e. Was the Respondent's decision to dismiss the claimant one which a reasonable employer could arrive at taking all relevant circumstances into account?

3. The tailored questions for the Tribunal to determine include the following:

   a. Did the Respondent note the Claimant's replies to its investigatory questions honestly and/or accurately? Insofar as the Respondent's replies were inaccurate or dishonestly recorded, does this effect the reasonableness of the Respondent's belief as to the relevant facts of the case and its ultimate decision to dismiss the Claimant?

b. Did the Respondent fail to provide the Claimant with a letter of dismissal, and if so, is this a procedural error, and a breach of rule 18 ACAS Code of Practice?

c. Did the Respondent fail to provide the Claimant with a copy of its appeal minutes, and if so, was this a procedural error?

d. Did the Respondent treat the Claimant under its process for misconduct, and should it have been under its process for capability instead, and if so, was this a procedural error?

e. Did the Claimant inform the Respondent that his statements during the investigatory process were inaccurately recorded, and was the Respondent's failure to stop the disciplinary and reinvestigate a procedural error?

f. Did the Respondent treat the Claimant even-handedly compared to other employees who were investigated for the same or similar counts of misconduct/performance, and if so, does this effect the fairness of the Respondent's decision to dismiss?

g. Did the Respondent fail to allow the Claimant opportunity to verify his answers to their questions until 4 February 2019, and if so, is this a procedural error?

h. Was the Respondent's decision to dismiss the Claimant tainted by race discrimination and, if so, does this render it unfair?

4. Given all relevant circumstances was the Respondent's decision to dismiss the Claimant within the reasonable band of responses open to a reasonable employer?

Direct discrimination

5. Did the Claimant suffer less favourable treatment because of his race, this being that of a Black British person?

6. Was that less favourable treatment:

a. Dismissing the Claimant on 18 February 2019; and/or

b. Dismissing the Claimant's appeal on 20 March 2019.

7. Are the Claimant's suitable comparators one or more of the other seven permanent members of staff who were accused of the same or similar to that of the Claimant, but not dismissed?

8. In the alternative is the correct comparator a hypothetical comparator who was accused of those allegations put to the Claimant in the same circumstances to the Claimant and who subsequently appealed?

9. Could the tribunal infer race discrimination from one or a combination of the following if proven:

    a. The alleged less favourable treatment itself.

    b. The allegation that the Respondent ignored the Claimant's question as to why he was treated inconsistently,

    c. The allegation that there was unexplained antagonism towards the Claimant.

    d. The alleged racially toxic environment, to include an incident where the Claimant says that his colleague Mr Hyett passed around a picture of a gollywog with a plastered foot, at a time when the claimant had injured his foot, about 2 years before the dismissal.

Limitation

Unfair Dismissal

10. Was it not reasonably practicable for the Claimant to file his claim of unfair dismissal within the prescribed limitation period?

11. In summary, the Claimant's last day for entering Early Conciliation under the primary limitation period was 19.5.2019. The Claimant entered into Early Conciliation on 14.6.2019, the day that he made contact with Clements solicitors. Thereafter the Claimant received his EC certificate and filed his claim by 21.6.2019. The Claimant has claimed that it was not reasonably practicable to file earlier owing to his father's terminal diagnosis and his care responsibilities.

Discrimination

12. It is an issue as to whether the first count of alleged discrimination is in time, namely the act of dismissing the Claimant on 19.2.2019. The second alleged act of discrimination is undoubtedly in time, as this was the alleged less favourable treatment in dismissing the Claimant's appeal on 20.3.2019.

13. The issue for the tribunal is whether both acts on 19.2.2019 and 20.3.2019 is alleged conduct extending over a period ending on 20.3.2019 within the meaning of section 123(2) in light of the Respondent's denial within its ET3. In the event that the tribunal determines that the above is not extended conduct, the tribunal will

be asked to determine whether it is just and equitable to hear both allegations in any event.

Remedy

14. Is the Claimant entitled to the basic award?

15. Is the Claimant entitled to claim financial losses? If so, at what level?

16. Is the Claimant entitled to claim an Injury to Feelings Award and if so within which Band?

3. It was confirmed at this hearing that the following allegations are no longer pursued by the claimant: -

(i) That he did not receive the letter of dismissal. That is no longer in dispute and therefore that issue is removed.

(ii) Although not in the list of issues the claimant had indicated that he might seek to argue he had not received his pay in lieu of notice but that is not now pursued, and he accepts that it was correctly given.

The Appeal as a discriminatory act

4. It was submitted on behalf of the respondent that the claimant does not address the alleged discrimination in relation to his appeal in his witness statement and it was proposed that the Tribunal could consider whether the appeal was a discriminatory act first and hear solely from the appeals officer to do that. If the appeal was not a discriminatory act then that claim would also be out of time as the unfair dismissal claim is said to be.

5. On behalf of the claimant, it was submitted that it was not possible to just take the appeal as an isolated act as the claimant relies on a background of discriminatory conduct and it would therefore be inappropriate to just look at the appeal. All the evidence must be heard first.

6. The Tribunal considered this matter and determined that it agreed with the submissions made on behalf of the claimant and that the evidence had to be heard before it could be determined whether there was a continuing course of discriminatory conduct.

7. The Tribunal adjourned to read for the rest of the first morning of the hearing. In the afternoon due to difficulties with the CVP platform it was not possible to continue, and the start of the evidence was adjourned till the morning of the second day. Since the Tribunal was not able to sit for the entirety of the listed allocation but only for four days of it, it was agreed that this would be a hearing of liability only and the claimant's representative would not need to cross examine the claimant on issues going to remedy. The Tribunal was able to conduct its deliberations on the

last day of the listing but did not have time to enable it to deliver the full reasons to the parties and therefore the decision was reserved.

8. The Tribunal heard from the following witnesses on behalf of the respondent:-

   (i) Andrew Scott, at the relevant time Interim Plant Manager, now Deputy Plant Manager.

   (ii) David King, Senior Operations Manager.

   (iii) Paul Smith, Head of HR.

9. Evidence was also heard from the claimant. A former colleague Ms Lyndsay Telakis was to have given evidence under a Witness Order requested by the claimant. The Tribunal was advised that the claimant no longer wished to call her to give evidence and the Tribunal did not hear from her and neither did it see a witness statement on her behalf.

10. From the evidence heard the Tribunal finds the following facts.

The Facts

11. The claimant was employed at the respondent's Haverhill site as a process technician with the job title of Technical II Production. His employment commenced on 1 March 2014 until it was terminated on the grounds of misconduct with effect from 20 February 2019. Prior to that the claimant had worked for the respondent as an agency worker from 2012 to 2014.

12. The respondent is a multinational organisation which manufactures pharmaceutical products for the healthcare industry. From its ET3 Response Form it employs 1,200 people in Great Britain and 275 at the site where the claimant was employed. It had HR Business Partners and Mr Paul Smith, who conducted the claimant's Appeal, is Head of HR. It is therefore large enough to be well resourced with its own HR Department.

13. Due to the nature of its product quality control is of critical importance to the respondent. Any slight deviation in the manufacturing process can potentially lead to the product not being produced to the required specifications. This could lead to incorrect strengths of medication or even the inclusion of foreign ingredients. That has potential to harm customers. As a result, the respondent requires any deviation from the standard operating procedure or from the usual method of manufacturing to be identified immediately. That would typically include calling a halt to the production line and reporting the deviation up the management chain of command.

14. The respondent's business is highly regulated, and it must ensure that the quality testing methods are kept under review. Products made in different

areas of the business are subjected to different means of testing. It is the respondent's case which the Tribunal accepts and indeed was not disputed at this hearing that the product produced and stored in Flexible Intermediate Bulk Container (FIBC) area of the business had been tested and certified as only requiring a test with a scoop. The product in the section known as K-30 stored in a drum had not been so certified and required testing with a piece of equipment known as a "sample thief", this is a hollow tube which allows samples to be taken from a deep container which will be representative of all depths.

15. The Tribunal was taken in the bundle to the Standard Operating Procedure (SOP) with the effective date of 21 June 2018 which dealt with "Preparation and use of K-30/K-32 pack off areas". Section 6.2 dealt with the sampling of the final product. In relation to a drum it stated as follows:

> "Carefully push the sample thief vertically through the powder until the rounded tip just touches the bottom. Rotate/twist the sampler a few times to ensure the tube is filled. Take care not to damage the polythene bags. Withdraw the sample thief slowly and empty into the sample container."

Claimant's Final Written Warning

16. In May 2018 the respondent discovered a very serious error in the production process. This prompted a site wide investigation into working practices. Mr David King who dealt with the claimant's disciplinary before this Tribunal was the disciplining officer for several individuals but not the claimant at that time. The investigation indicated that it was likely that a culture of cutting corners had crept into the workforce and affected every level of the production staff from technicians on the shop floor right up to shift managers. Many employees received disciplinary warnings over the incident the severity of which reflected their level of culpability.

17. The Tribunal saw the notes of the investigation meeting with the claimant held on 22 May 2018 conducted by Mr Pina-Dreyer. The interview took the form of prepared questions as it did in the matter the subject of these proceedings. The first question put to the claimant was, "Had he ever falsified a batch record" and he stated, "I have to say I have in the past a couple of times". He acknowledged this could have been within the last month.

18. In relation to question 2 when he was asked, "Why have you done this?" the claimant said: -

> "It is hard to explain, you are doing a job, taking readings, having a conversation, you do other things and I thought this time I will do that. It was the wrong thing to do I see that. I have done something wrong, unforgivable and whatever action you take I will accept."

19. When asked if he understood the impact of this the claimant stated: -

> "Yes, the impact is this meeting, when you explained to me before in the office about the effect. You need to be able to say 100% that this is good powder and there is an impact and danger to the patient if you cannot clarify the readings in the batch record."

20. The claimant went on to state: -

> "I apologise it will never happen again but words do not mean anything here. You have lost trust in me and the only way to get that back is to show you. If you do not trust me then I understand what that means."

21. The claimant was subject to a further interview on 31 May 2018 by Emmanuelle Dubois. He was asked at what frequency he had done this to which the claimant replied:-

> "I do it most of the time. In a 12 hour shift you should run the test 11 maybe 12 times, out of that I would do it maybe once or twice per shift."

22. When asked when he had started to operate in this way he stated:-

> "It started about a year after I started here, up to 5 years ago but not to this level. It started off just missing one reading, I would go back take next reading and it would virtually be the same as before. It then built up recently."

23. He acknowledged at the end of the interview that "trust is gone" and only wished to add that he apologised.

24. The claimant was invited to attend a disciplinary hearing which took place on 11 June 2018. This was before Gary Cavallero, not one of the officers of the company involved in these proceedings. The disciplining officer accepted and gave credit for the claimant's honesty and suggested that the way to move forward was to:-

> "Tell the truth 100%. Holding back information is not what we expect employees to do, it makes things worse rather than better."

25. By letter of 12 June 2018 the claimant was advised of the outcome. It was found that the claimant had failed to follow procedure by falsifying data. The allegation of gross misconduct was well founded. The claimant would be issued with a final written warning in accordance with the disciplinary policy. His conduct would be monitored, and should he fail to achieve the required standard he may be subject to further disciplinary action. The warning was to be placed on his personnel file for a minimum of 24 months and may be regarded for further disciplinary purposes.

Declaration of Commitment

26. Following this incident staff were asked to sign a declaration of commitment dated 12 June 2018. This acknowledged that the employees were working on a site manufacturing active pharmaceutical ingredients intended to be taken by patients and that the employee understood the

principles of good manufacturing practices and committed to the fundamental principles of data integrity and traceability. Of particular importance to the facts of this case before this Tribunal was the commitment that the employee gave as follows :-

> "I understand that if I cannot perform a task as expected it needs to be reported and recorded appropriately."

2019 Issues

27. Andrew Scott was responsible for conducting the investigation into the matters which led to the claimant's dismissal. At that time, he was Interim Plant Manager and is now Deputy Plant Manager. He had conducted two previous investigations.

28. On 7 January 2019 a temporary technician was being observed by Michael Gibbons, a Senior Processing Technician in carrying out his tasks in the building referred to as K-30. He was observed to be performing tasks in a manner that went against some of the governing procedures in that he was seen using an incorrect piece of equipment to take samples from the product. He was using a 'scoop' instead of a 'sample thief'. This was a deviation from the usual practice and the Standard Operating Procedure. The scoop should only have ever been used in building K-32. Mr King explained in cross examination that there were three sampling tools. A 'thief' is a long thin tube used in K-30. There is a long handled, approximately one metre long, cylindrical cup scoop. In K32 there is a shorter handle scoop which he described as like a 'pick and mix' scoop.

29. The work in K-30 had been "mothballed" for some time for nearly all of 2018 but had become operational again on 16 December 2018. As a result of the observation on 7 January 2019 Andrew Scott determined that all product testing on batches between 16 December 2018 and 7 January 2019 were deficient. The respondent's processes were such that they were able to identify the relevant batches of product and the technician responsible for conducting the test. Mr Scott prepared a timeline that documented a part of the investigation setting out the relevant dates, the testing technicians and the batch numbers that were recalled. This was seen in the tribunal bundle at page 168. In the next document on page 169 is a list of all those who were interviewed, and this was a total of 14 from 4 different shifts. Mr Scott chose to interview only those he identified as having been involved in sampling during the relevant period of 16 December to 7 January and the Tribunal accepts that was a reasonable decision for him to take. It was speculation on the part of the claimant's counsel to suggest to Mr Scott that had he interviewed others as to what they would have done faced with the wrong tool that they would have said they would have used it as the claimant did. That is hypothetical and would not have assisted the investigative process.

30. Unfortunately, Mr Scott did not prepare an investigation report which is what the Tribunal would usually expect to see from an investigating officer

which would draw together all the interviews and other evidence that he had before him. What the Tribunal did have however were some, but not all, of the interviews that were conducted. Mr Scott determined that it was appropriate to interview all Shift Managers and that is seen from the document at page 169. He did not however interview all the Shift Leaders. He determined that as far as Shift Managers were concerned, "Most were unaware of the fact that the incorrect sampler was being used during the course of their shift. For that reason, no action was taken in relation to them" (paragraph 11 of his witness statement). In the case of Mark Bilbe and David Grace however the position was different.

31. It was discovered that Adam Try, a Process Technician, had reported to the control room that the correct sample thief could not be found. In his second interview he explained that the standard thief was removed by him to K21 at the end of the last 'campaign' in K30. When he realised that the incorrect thief was in K30 he told Mark Bilbe/David Grace that he was going to K21 to try and find the correct thief. He then reported back to them that he could not find the correct thief in K21. It further appeared that nothing had been done to ensure the correct thief was then found and used and this had caused the technicians to use the scoop from K-32. As it was Mark Bilbe and David Grace to whom Adam Try reported this, further action was taken against them as Adam Try had expressly raised concerns with them.

32. It is not clear to the Tribunal why other Shift Managers were not interviewed. If, as managers, they were unaware of the fact that the incorrect sampler was being used then a reasonable investigation would have considered whether they had some responsibility as managers for that lack of awareness.

33. Further, there is no evidence before the Tribunal as to how Mr Scott came to the decision not to proceed against the Shift Manager Paul Anthony of the claimant's shift. The document at page 169 shows that he was interviewed and it has a "No" against the question "Was he aware that anything was wrong". As the Tribunal has not seen the notes of his interview it does not know what he had to say. Dave Bray the Shift Leader of the claimant's shift was not spoken to at all and there is no explanation for that either.

34. Mr Scott also determined that a few individuals had not been signed off as "competent" by which he explained that he meant by that, not fully trained. He determined they should not be the subject of investigation it appearing logical to him that those who were not signed off as fully trained should not be viewed in the same light as those workers with experience. The Tribunal does not understand his rationale for this. It is not clear from his evidence why everyone involved in sampling within the relevant period was not at least interviewed. There may then have been mitigating circumstances as to why in relation to a certain individual the decision was taken not to proceed to a disciplinary but that would be a separate issue.

35. Mr Scott went on in his paragraph 12 to state that Adam McClelland, Andrei Lasconi and Tomasz Krisz were not the subject to any investigatory interview. They only joined the respondent's business in October 2018. They were at the early stages of their training but had no exposure to K-30 prior to 16 December 2018 when it came back online. Mr Scott has not been able to explain to the Tribunal's satisfaction why it would not have been considered appropriate to at least interview them. They are on his timeline as sampling in the relevant period. If they were undergoing training then it would have seemed relevant to ascertain what training they had been given about the appropriate sampling tool.

36. At paragraph 30 of his witness statement Mr Scott stated that the competency records in relation to Catalin Sanhu and Tomasz Zurawski could not be located as they had been archived. The Tribunal did not find Mr Scott's evidence on this point convincing as he could not explain why this would mean that they should not at least be interviewed. In fact, the Tribunal has found during its deliberations that Catalin was interviewed (page 318) and stated that he used the scoop.

37. In paragraph 13 of his witness statement Mr Scott explained that in relation to Darryl Molloy he informed him during his investigatory meeting that he had not received relevant training in the K-30 area. Mr Scott stated, "I took this at face value and decided not to investigate further". He only realised in preparing for these proceedings that Mr Molloy was in fact trained and signed off as competent. He recognised that was a mistake that he had made. Again, however his evidence on this matter is not convincing in that in his own timeline at page 168 he shows Mr Molloy as overseeing another member of staff. That should have alerted him to the fact that he was involved in supervising and therefore must have been trained.

38. The way in which the investigation was conducted was a set of questions that were posed to each of the interviewees. Mr Scott believed he had drafted them, and he hand wrote the answers against the questions although the Tribunal does not have the handwritten notes. The Tribunal has a typed-up version. The claimant took issue with the typed-up answers alleging that the document had been falsified. The Tribunal is not prepared to accept that assertion but does find that it would have been a much better practice to have noted the interviewees answers verbatim.

39. The first interview of the claimant appeared at page 170 of the bundle. It is not dated. The first question posed was "When was the claimant trained in the relevant procedures?". The answer given is:-

> "SOP – MFG-07 trained years ago, latest version 21st June 18 start of December 2018 for MRs."

40. The Tribunal accepts the claimant's evidence that it is highly unlikely that he would have answered in that way. It accepts that he raised with

Mr King at the disciplinary hearing that he did not say that but said that he been trained 7 years ago.

41. Mr Scott determined that it was appropriate to interview the claimant again and the Tribunal has no criticism of that where he felt the need to ask further questions. The claimant was not singled out for a second interview as the Tribunal has seen that others were interviewed a second time. Pavel Krutul, Monica Sosnowska and Adam Tye were re-interviewed

42. Following the interviews, the claimant was initially suspended by Mark Hyett on 23 January 2019 from sampling. Shortly thereafter he was suspended completely pending the investigation by letter of 1 February 2019 from Declan Costello, HR Business Partner. No witness before this Tribunal was able to explain how and why those two different decisions were taken.

Invite to Disciplinary Hearing

43. On 4 February 2019 the claimant was invited to a disciplinary hearing to be conducted by David King. An HR Business Partner, Declan Costello was to be present as was Donna Bootle a notetaker. The allegation of gross misconduct was the incorrect sampling of Sevelamer Hydrochloride being carried out in K-30 and the claimant's subsequent actions on realisation that the incorrect sampling thief was being used. It was alleged that the allegations were in contravention of section 5.7.18 of the Employee Handbook and amounted to gross carelessness, incompetence or negligence. If the allegations were upheld the claimant was advised of the possibility of summary dismissal on the grounds of gross misconduct. The claimant was informed of his right to be accompanied and he continued to be suspended pending the outcome of the disciplinary hearing. The claimant informed the respondent that he intended to bring Tony Hope with him as his companion.

The Disciplinary Hearing

44. The Tribunal saw the minutes of the disciplinary hearing at page 178 of its bundle. It was conducted on 8 February 2019. The claimant was given every opportunity at the disciplinary hearing to state exactly what his position was and in fact Mr King went further then might be expected in that he went over the claimant's answers as part of the investigation so was in fact investigating again himself. The claimant started by stating that his answers that were recorded were 'close' but it was not true to say that he realised that he had been using the wrong thief. He went through the answers to the questions and as noted above stated that his answer to question 1 at the first interview was not as stated, he stating that he had been trained 7 years ago. In relation to question 10 which was "If you knew the correct equipment was not available, did you raise this with your

Shift Manager?". The answer noted by Mr Scott was "Did wonder why, but forget to raise it.".

45. The claimant made it clear at his disciplinary hearing that this was misleading. Before Mr Scott had asked him that question the claimant said, "Do you know what you have done is wrong?" and the claimant said, "He had no idea it was wrong". Mr Scott then "Put the procedure under my nose and I read the procedure and I said I can see what the problem is. Up to that point I did not know what we were using was incorrect.".

46. The claimant made it clear at the Disciplinary Hearing that he had used the tool available on the assumption that as it was there it was the correct one to use. He was not alone in that belief. Others thought that also.

47. The claimant was adamant throughout that he did not know it was the wrong thief just that he knew it was different. He assumed it was ok to use.

48. The Tribunal saw a document prepared by Mr King at page 217 of its bundle showing his rationale for his decision. It is headed "Incorrect thief investigation notes". The first section is a conclusion on the people investigated. This document has no date or name on it but Mr King confirmed it was his rationale. It therefore shows his thinking at the time.in his witness statement at paragraph 10 he stated that he was involved in other related disciplinary hearings the last of which was on 13 February 2019. That evening he prepared this document to set out his decisions and rationale and sent it to the Senior Management Team. It was not for the purpose of seeking their approval but to demonstrate his rationale. Although Mr Hyett is on that team there is no evidence before this tribunal that he played any part in the decision making process of Mr King or had any influence on it. In this document Mr King is seen as accepting that there were things done wrong by the company with regard to training. He made it clear in his evidence and it is set out in this document that a final written warning would have been recommended in relation to the claimant however in view of the final written warning the outcome had to be dismissal.

49. In that document some of the conclusions Mr King noted contained the following:

- 'Lack of escalation from Temps – lack of what is a GMP issue to escalate – it didn't trigger
- Lack of leadership SM to act – No instructions and didn't inform peers via logs
- Lack of ownership/communication between SL and SM on the topic/issues.
- A sense of 'it was different' not wrong
- Techs don't know 'why they have to sample to the bottom

50. He went onto make short, mid and long term recommendations many of which related to training and communication issues and a review of documentation.

51. In relation to the claimant he concluded 'recommend written warning as no awareness of the issue, no confidence given that a similar issue would trigger a stop and no escalation. Plus last years' warning = dismissal'.

52. Mr King sent an outcome letter to the claimant dated 20 February 2019 which as stated at the outset of these reasons the claimant now accepts he did receive. This confirmed the decision to terminate the claimant's employment on the grounds of conduct. The reasons for the decision were stated as : -

> "You confirmed that the sampling thief that you used in K-30 to sample was not the sampling thief that you had used previously.
>
> You confirmed that you had not been trained to use the incorrect sampling thief.
>
> You were unable to correctly describe the correct procedure for sampling in K-30. You confirmed you did not raise the issue of a different sampling thief being used.
>
> You were also still on a 24 month final written warning issued in June 2018."

53. The claimant was advised of his right to appeal within 7 days of the date of that letter.

54. The tribunal accepts Mr King's evidence in his witness statement (which as not challenged) that he had no knowledge of the 'gollywog incident' until raised at the case management hearing and that it therefore had played no part in his decision making.

The Claimant's Appeal

55. The claimant submitted an appeal dated 25 February 2019 stating that he believed his dismissal was a clear case of victimisation. There were about ten technicians who all used the incorrect thief, and he did not understand why he was the one to be dismissed. There is no mention in words of race discrimination in that letter and nothing about the incident which the claimant raised for the first time at the case management hearing before Employment Judge Warren. At that hearing he raised that approximately 2 years previously at a time when he had injured his foot a picture was passed round by his line manager Mr Hyett of a gollywog with an injured foot. The claimant clarified in his evidence that he believed this was in fact 4 years previously. The allegation was made against Mr Hyett. It was never raised at the disciplinary hearing or appeal and was not in the ET1 Form.

56. In his appeal letter the claimant alleged that Andy Scott had come to him with a second set of questions which he believed had been "specifically

engineered to single me out from others". He was adamant that he had not known he was using the incorrect thief "only that it was a different one". The claimant pointed out that he had challenged the answers to these questions at his disciplinary hearing. He had explained then that the only time he realised he had done something wrong was when Andy Scott had shown him the actual SOP.

57. The claimant also alleged that Declan Costello had expressed a desire for him to leave the company back in June 2018 in front of all who were present including Donna Bootle. He allegedly asked the claimant when he was going to hand in his notice and the claimant therefore questioned how he could conduct an impartial disciplinary hearing. He considered he had been singled out unfairly in this matter. Declan Costello had been present however at the disciplinary hearing as HR Business Partner and was not the decision maker.

58. The appeal hearing was conducted by Paul Smith Head of HR. The claimant was accompanied by Tony Hope again.

59. There was discussion of the answers that the claimant gave at the investigatory meeting and his allegation that there had been falsification of a document namely the minutes of that. Paul Smith put it to the claimant that he knew that the thief he was using was different and the claimant was clear that he did not know it was one he could not use. He stated he did not realise they were not allowed to use that thief. Paul Smith took him again to the procedure and asked how he could get to the bottom of the drum with the thief he had used and the claimant accepted that he could not. He was asked whether that had occurred to him at the time. The claimant said, "No it had not" and he explained how he had used a long handled scoop that you fill and pull out but do not twist. He accepted his mistake and held his hands up but questioned why it was only him. Mr Smith made it clear to him it was not only him. The claimant acknowledged when the procedure was put in front of him that it was obvious but his point was there were ten of them and he questioned how only two of the ten got taken through a second set of questions. The claimant is noted as accepting that there was no way he could comply with the SOP with the tool that he used. He acknowledged "all of us should have been able to notice that". The claimant maintained he had not been treated fairly and had been victimised. Despite the detail Mr Smith went into the claimant raised no allegations about his race although he did talk about bias and victimisation.

60. Following the meeting Mr Smith had two further meetings with Declan Costello and Donna Bootle to explore whether there had been bias against the claimant.

61. The appeal outcome was dated 20 March 2019 and sent to the claimant by recorded and first class delivery. The appeal was not upheld. Mr Smith noted that the Standard Operating Procedure clearly indicated how the sample thief must be pushed vertically through the powder until the

rounded tip touched the bottom of the drum. It should have been apparent that the tool the claimant was using would not enable him to collect the sample as indicated by the SOP. Even though he knew the thief he was using was different he made no attempt to question this by escalating it to managers.

62. With regard to bias Mr Smith confirmed that he had carried out further investigations and reviewed the minutes of the investigatory and disciplinary hearings and had not seen any discussion which indicated that the claimant had been put under pressure to resign. He had no evidence that the company was engineering ways to remove the claimant from employment.

63. With regard to the suggestion the claimant had been denied the opportunity of representation at the outcome meeting he had also investigated that. The claimant had wanted the hearing of the 20th rescheduled to 21st because Tony Hope could not be present. As David King was not available on 21 February as he was on holiday for the rest of the week he was advised it should take place on 20 February as planned and the claimant had accepted that. It was to confirm the outcome and not conduct a disciplinary hearing.

64. In conclusion the fact that the claimant was already in receipt of a final warning which was still valid for another 18 months due to the event in May 2018 meant that any further breaches of procedure would have a risk of resulting in termination of his employment. For those reasons the appeal was not upheld.

65. The claimant alleges that both Monica and Pavel worked until at least the time he put in his appeal but he was suspended and they were not. Mr Scott stated they were agency workers and the same process did not apply to them. He accepted however the claimant's chronology as he did not know when they went. There has been no explanation from the respondent as to why they continued to work and the claimant was suspended.

Limitation

66. There is now no dispute that the effective date of termination was 20 February 2019, the claimant having accepted that he did receive the letter of dismissal. The primary limitation period therefore expired on 19 May 2019.

67. In the claimant's witness statement, he explained that his father was admitted to hospital on 2 May 2019 with a terminal illness and discharged on 12 May 2019 to spend his remaining days in the care of his family. The claimant's father was taken from hospital to his home in Reading. The claimant would travel there from Sudbury, Suffolk to care for him at various times. He expanded in cross examination that he was not the primary carer but this was a task he shared with other family members. He would

travel once a week to Reading and sometimes stay there 3-4 days and then return to Suffolk. When caring it was a 24 hour role. This continued until sadly his father's death on 6 November 2019.

68. The claimant had initially been told by Tony Hope, the companion who attended the disciplinary hearing and the appeal with him that he had 5 years within which to bring a claim. Mr Hope was a technician like the claimant but had been a manager at another company and the claimant had therefore accepted his advice. The claimant was not sure when he had that conversation with Mr Hope. He thought that it was probably after he became concerned about his father's care in hospital following an assault and his discharge on 12 May 2019. He thought the conversation was probably somewhere near 12 May 2019.

69. In the claimant's witness statement, he stated that he was also hampered by not having copies of the appeal minutes in relation to his dismissal. In cross examination he stated that was an added issue although he acknowledged he never made any enquiries to get the appeal minutes and the tribunal is satisfied he did not need them to issue a claim.

70. Initially the claimant had spoken to David Grace (the Shift Leader who was also dismissed) who told him the name of his solicitor and the claimant made enquiries of them but they were not prepared to take the case on. They told him that it was already out of time.

71. The claimant felt there was nothing else he could do but then decided to go online and called the first solicitor in his area that came up which was the current solicitor he has at Clements. They agreed to take on the case. The detail of this was not in the claimant's witness statement but he believed it was the week that time had run out when he first spoke to Mr Grace's solicitor. It is known that he invoked ACAS Early Conciliation on 14 June 2019, the certificate being issued on 21 June 2019 and that seems to be the time when he instructed Clements. There was therefore approximately 3 weeks after he had seen the first solicitor before he took any further action.

Submissions

72. Ms Ismail had prepared a draft skeleton for her own use but in view of some of the technical difficulties that the Tribunal was having particularly with her sound on CVP it was agreed there would be an adjournment for her to finalise those submissions so they could be disclosed to the respondent's representative and the Tribunal who would read them before hearing from the representatives orally.

For the claimant

73. It was argued that the investigation was wholly inadequate. Mr Scott only spoke to ten others and not the other technicians who had been working in

the relevant period. He gave no adequate explanation as to why action was not taken against some of the others that he interviewed.

74. Mr Grace was more senior yet he survived. It was submitted there was in fact no misconduct. Mr King even accepted that the conduct would not in itself have justified dismissal and relied on the final written warning to justify that. It was submitted on behalf of the claimant that this was either a training or capability issue.

75. With regard to the final written warning, the claimant does not ask the Tribunal to go behind it, it is there and exists but the Tribunal is entitled to take account of the factual circumstances giving rise to that warning and the claimant argues that it was manifestly inappropriate.

76. Due to the deficiencies it was submitted that the Tribunal can infer that there was a discriminatory motive. Whilst the gollywog incident is not in the ET1 the Tribunal heard how quickly the claim had to be submitted and this omission was rectified at the preliminary hearing. It is not relied upon as a discrete allegation of racial discrimination but it is relevant background. The only person who gave evidence on it was the claimant. Mr Hyett did not attend. He could and should have done so to answer these serious allegations. Even Mr Scott did not think the claimant would invent the allegation. It was Mr Hyett who suspended the claimant.

77. At the appeal the claimant repeatedly raised the issue of being treated differently but Mr Smith did nothing to address that allegation.

78. With regard to limitation, whilst it was accepted that the unfair dismissal claim is out of time the Tribunal was urged to follow the decision in Marks & Spencer and adopt a liberal interpretation of the relevant authorities in favour of the claimant. He has a compelling case on the issue of limitation. In relation to discrimination, the test is not so strict and the Tribunal has a much wider discretion. The delay that there has been has not prevented a fair case being heard. The claimant's primary position regarding the discrimination case is that it is not out of time as the appeal was in time and there was an ongoing course of conduct right from the investigation to the appeal. In the alternative, it is just and equitable to extend time.

For the respondent

79. It was submitted that the respondent is in a highly regulated industry where testing and process are paramount. A substantial number of employees were subject to the disciplinary procedure. It was clear from the claimant's cross examination he knew how the testing should be done and he was not doing it. The final written warning is not part of a complaint of race discrimination. It is in that context that it led to the decision to dismiss.

80. The claimant was not familiar with the tool that was in K-30. He said he had never used it. He said he had a passing thought it was not the correct tool to use. It was submitted he knew the difference but did nothing to act upon that. Whilst the claimant compares himself to Mr Try he did report it but the claimant did not and there is therefore a significant difference between their circumstances.

81. The claimant says there was a flawed investigation and suggests it was not broadened out to the other technicians. It was fair however for the respondent to investigate those they did and the Tribunal has heard from Mr Scott with regard to that investigation. He excluded certain individuals due to the short length of their service and inadequate training, and his explanations are credible.

82. Whilst Mr Grace was not dismissed he was disciplined and received a final written warning. The difference between him and the claimant was that he had not been in receipt of a final written warning in relation to previous conduct.

83. There is no evidence of Mr Scott falsifying documents in the investigation. The claimant did not believe that at the time. At the disciplinary hearing his own comment was that the notes were “close” and that is a far cry from the claimant’s position now that they were falsified. There was significant discussion with Mr King where the claimant had every opportunity to explain the answers he had given. It was of course right for Mr King to make further enquiries of the claimant, that was not less favourable treatment, simply doing what he should as the disciplining manager.

84. The dismissal was within the range of reasonable responses as there was the final written warning. Mr King was entitled to find the claimant as an experienced technician should have realised that the tool was not right.

85. Mr Smith was an impartial HR manager to hear the appeal. His focus was on the claimant and less on comparators but that does not demonstrate an unfair process or that he was motivated by discrimination. The claimant’s witness statement is very light on detail about why he says the appeal hearing was another act of discrimination.

86. The dismissal was fair, within the band of reasonable responses and not discriminatory. There is not sufficient evidence to shift the burden of proof to the respondent but if the Tribunal were not with the respondent on that it states that its explanations for any differential treatment are clear and plain.

87. Regarding limitation, the Tribunal cannot be dealing with a continuing act ending with the appeal if the appeal was not motivated by discrimination. Time must therefore run from the effective date of termination in respect of both claims.

88. The respondent's position is that both claims are out of time including the discrimination.

Relevant Law

Unfair Dismissal

89. It is for the respondent to establish that it had a reason for dismissal and that this was a potentially fair reason falling within s.98 of the Employment Rights Act 1996. The respondent relies upon conduct. In that case the respondent must satisfy the three-fold test set out in British Homes Stores Ltd v Burchell [1978] IRLR 379. There must be established by the employer the fact of that belief namely that the employer did believe in the misconduct. There must then be shown that the employer had in its mind reasonable grounds upon which to sustain that belief and at the stage at which the employer formed that belief on those grounds it must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

90. If the employer establishes the potentially fair reason for dismissal the Tribunal must apply s.98(4) and determine whether the dismissal was fair or unfair having regard to the reasons shown by the employer and having regard to all the circumstances of the case. It is not for this Tribunal to substitute it view for that of the employer, but it must be satisfied that the sanction was within the range of reasonable responses.

Discrimination

91. The claimant asserts that he has been treated less favourably on the grounds of his race, a claim of direct discrimination contrary to s.13 of the Equality Act 2010. The claimant must point to the treatment of a comparable employee whose circumstances are not materially different to those of himself (s.23(1)).

92. The onus is on the claimant to establish facts from which the Tribunal could conclude that there was such less favourable treatment and only then does the burden of proof pass to the employer to provide an explanation which is in no way tainted by discrimination (s.136 Equality Act 2010).

Limitation

93. In relation to the complaint of unfair dismissal, the Tribunal must consider whether the claim was submitted within the time period laid down by s.111 Employment Rights Act 1996 which provides at sub paragraph 2:-

> "Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or

> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

94. In Palmer & anor v Southend on Sea Borough Council [1984] ICR 372 the court stated that the test could be said to be 'something like reasonably feasible'.

95. Ms Ismail referred to Marks and Spencer v Williams-Ryan 2005 WL 1078583 in which it was stated that the section 'should be given a liberal interpretation in favour of the employee'. The court however also considered the issue of ignorance of the right to claim and/or the time limit for doing so and stated at paragraph 21:

> '…regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had or she acted reasonably in all the circumstances.'

96. The court referred to the decision of Wall's Meat Co Ltd v Khan [1979] ICR 52 in which Brandon LJ stated that:

> 'I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant…By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries

97. With regard to the Equality Act claim, the test is that laid down in s.123 Equality Act 2010 which provides:

> (1) Proceedings on a complaint within section 120 may not be brought after the end of-
>
> (a) The period of 3 months starting with the date of the act to which the complaint relates, or
> (b) Such other period as the employment tribunal thinks just and equitable.

98. This clearly gives the tribunal a much broader discretion than in relation to the unfair dismissal complaint.

Conclusions

Unfair dismissal

99. From the evidence heard the Tribunal has had to conclude that it was reasonably practicable for the claimant to have presented his complaint in

time. Whilst having every sympathy with the claimant having difficulties due to his father's terminal illness there was not actually an impediment stopping him presenting the claim in time. It was 'feasible' for the claim to have been submitted in time.

100. The claimant stated that he was wrongly informed by Tony Hope that he had 5 years within which to bring a claim. The claimant confirmed that he was a technician like himself but had been a manager at another company The claimant thought that their conversation was probably between 2 and 12 May. The tribunal has to consider what opportunities the claimant had to find out his rights and whether he acted reasonably. He knew of the right to claim and did not seek specialist legal advice about how to enforce that right and did not act reasonably in relying on the information from another technician.

101. The claimant demonstrated that he was able ultimately to use the internet to find a solicitor. There was no evidence that he had tried to find out more about time limits prior to speaking to Mr Grace's solicitor.

102. The Tribunal is therefore satisfied that it was reasonably practicable to have presented the claim within the 3 month time limit and that the unfair dismissal claim was issued out of time.

103. If the Tribunal were wrong in that conclusion it gives its decision in relation to the unfair dismissal complaint.

104. The respondent has stated that this was a conduct dismissal a potentially fair reason falling within section 98 ERA. The three-fold Burchell test applies. The Tribunal does not accept that the investigation was a thorough and fair one.

105. There were a number of technicians involved in the sampling in the K-30 area and only ten were interviewed. Of those it is far from clear as to why all were not disciplined.

106. Mr Scott gave unconvincing evidence as to why those who had not been fully trained were not at least interviewed. He was wrong that Darryl Molloy had not been fully trained a fact he could have easily checked.

107. Whilst the tribunal has found no evidence that the notes of the claimant's interview were 'falsified' as he alleges his answers were not adequately recorded and the tribunal did not see the contemporaneous documents.

108. There was no investigation report bringing all the evidence together. In fact it is not at all clear what happened between his interviews and the invite to a disciplinary hearing.

109. If so many were using the wrong tool then this would appear to have been much more a case of capability and lack of training and support than a misconduct issue. That seems to be reflected in Mr King's rationale document in the recommendations he made. In that event the respondent

could have ignored the final written warning and considered whether the more appropriate way forward was another warning coupled perhaps with training and further direction (again which form part of his recommendations).

110. It would follow therefore that the Tribunal would have found the dismissal procedurally unfair. However, there would be significant issues and arguments to be heard in relation to whether dismissal would have occurred in any event and the issues of causation and contribution around the clear direction in the Standard Operating Procedure that testing must go to the bottom of the drum and how the claimant was not able to explain how that could be done satisfactorily with the scoop that he used.

Race discrimination

111. The Tribunal does not find that there has been any evidence adduced by the claimant to show that there was a continuing course of conduct of discrimination culminating in the appeal hearing. The claimant's evidence was very sparse as to what is said to be discriminatory in relation to the appeal. It therefore follows that the discrimination claim was also submitted out of time. In relation to that however the Tribunal is conscious that it has a wider discretion with the just and equitable extension to consider whether it still has jurisdiction. It does therefore find that it was just and equitable to extend in all the circumstances, the cogency of the evidence has not been affected and there was only one month's delay. In relation to that claim only therefore the Tribunal is satisfied that it did indeed have jurisdiction.

112. In relation to the substance of the claim the Tribunal has reminded itself firstly that the burden is on the claimant to establish facts from which it could conclude that there was a difference in treatment due to his protected characteristic of race but that a difference in treatment and difference in race are not in themselves sufficient. The claimant has not so satisfied the Tribunal. The claimant was treated fairly at the final written warning stage and not dismissed even though they found that it was gross misconduct.

113. The one matter that the claimant asked the Tribunal to draw inferences from namely the incident of the gollywog picture was not raised during employment, during the disciplinary or appeals procedures and was not pleaded in his ET1 form. It turned out in the claimant's cross examination that it was even longer ago than he had initially remembered being 4 years previously to the incidents in question. None of those concerned in that incident were involved in the claimant's dismissal. Mr Hyett did suspend the claimant from sampling but it has not been alleged that the act of suspension was in itself a discriminatory act. There is no evidence before the tribunal that Mr Hyett played any part whatsoever in the decision to dismiss. Those who the Tribunal heard from as part of that process it accepts were not aware of it until it was raised in these proceedings.

114. It follows from these conclusions that all claims are dismissed.

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Employment Judge Laidler

Date: 8 November 2021

Sent to the parties on:

16 November 2021

For the Tribunal Office