



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Nicolas Toure

**Respondents:** Ken Wilkins Print Ltd

## Record of an attended Full Hearing heard at the Employment Tribunal

**Heard at:** Nottingham                      **On:** 4, 5, 6, 7 and 8 October 2021  
Reserved to 8 December 2021 (in chambers)

**Before:** Employment Judge M Butler  
**Members:** Ms J Hallam  
Mr C Tansley

### Representation

**Claimant:** Mr C Onyeari, Solicitor  
**Respondent:** Mr J Howlett, Counsel

# RESERVED JUDGMENT

1. The unanimous Judgment of the Tribunal is that the claims of direct race discrimination, discrimination on grounds of religion or belief, harassment and victimisation, are not well-founded and are dismissed.

# RESERVED REASONS

### The Claims

1. The Claimant presented his claim to the Tribunal on 7 November 2019. He was employed by the Respondent from 16 April 2018 to 14 October 2019 when his employment was terminated for conduct reasons. The Respondent is a Commercial Printer producing carton board packaging mainly for use by food

producers. The Claimant was employed as a Forklift Truck Driver and Warehouse Operative. He describes his race as Black African and his religion or belief as being Muslim.

2. Briefly, the basis of the Claimant's claims is that he was called racist names on a number of occasions by colleagues, was made to do work he was not employed to do, and other employees were aggressive towards him and treated his religion disrespectfully by asking why he was fasting. He claims that white employees were and would have been treated differently and the matters referred to above amount to harassment. He raised a grievance after being called racist names and says that his treatment by the Respondent and its employees thereafter amounted to victimisation leading to various detriments including his dismissal. The Respondent denies any kind of discrimination and says that the Claimant was dismissed for conduct reasons.

### **The Issues**

3. There was no agreed list of issues but the issues to be decided by the Tribunal appear to be:
  - 3.1. Whether the Claimant was treated less favourably than an actual or hypothetical comparator;
  - 3.2. Whether the Claimant has proved facts from which the Tribunal could conclude that the difference in treatment was because of his race or religion or belief; if so, has the Respondent proved that it did not treat the Claimant less favourably because of his race, or religion or belief;
  - 3.3. Whether the alleged actions of the Respondent amounted to unwanted conduct related to the Claimant's race which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him;
  - 3.4. Whether after raising a grievance, the Claimant was subjected to detriments including the matters referred to above and by dismissing him.

### **The Law**

4. Section 4 of the Equality Act 2010 (EqA) provides that protected characteristics include race and religion or belief.
5. Section 13 EqA provides:

*“(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”.*

## 6. Section 26 of the EqA provides:

*“(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) .....*

*(3) .....*

*(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”.*

## 7. Section 27 of the EqA provides:

*“(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a) B does a protected act, or*

*(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act—*

*(a).....*

*(b) .....*

*(c).....*

*(d) making an allegation (whether or not express) that A or another person has contravened this Act”.*

## 8. Section 39(2)(c) of the EqA provides that:

*“(2) An employer must not discriminate against an employee —*

*(c) by dismissing him”.*

## 9. We were referred to the following cases:

- ***Igen Limited & Others v Wong [2005] ICR931***
- ***Madarassy v Nomura International Plc [2007] ICR867***
- ***Veolia Environmental Services UK v Mr M Gumbs UKEAT/0487/12/BA***

### **The Evidence**

10. We heard evidence from the Claimant and for the Respondent from Mr B O'Dowd, Production Director, Mr A Wilkins, Senior Manager, Mr J Mayfield, Print Manager, Mr N Brown, Warehouse Worker, Mr S Wheelan, Legal Representative, Mr A McEwan, Delivery Manager, Mr A Forbes, Warehouse Supervisor and Mr W Abdelaziz, Warehouse Worker.
11. There was an agreed bundle of documents of 210 pages supplemented by a bundle of documents of 50 pages emailed to the Respondent's representative just before midnight on 4 October. Regrettably, it was a common theme emanating from Mr Onyeari that there were issues with the bundle and he had not received documents from the Respondent (subsequently confirming he had received them) and, in one instance alleging that the Respondent had effectively tried to deliberately mislead him in relation to the documents generally. We say for the record that we found these comments to be totally without foundation.

### **The Factual Background**

12. The Tribunal is not obliged to consider every factual issue arising during the course of a hearing. However, a Tribunal must make findings of fact based on the oral and written evidence before it and, if it prefers the evidence of one party over the other, it must say why.
13. We found the evidence of the Claimant to be totally unreliable. On a number of occasions he attempted to make allegations which had not been previously disclosed and regularly had great difficulty in answering the questions put to him by Mr Howlett. In relation to his allegation that the Respondent had a racist culture, the Claimant relied on a colleague telling him that the founder of the Company, Mr Wilkins senior, was a racist despite the fact that Mr Wilkins senior has been dead for over 20 years and neither his colleague nor the Claimant had ever known him. The Claimant also maintained that he had never been issued with workwear on a particular date despite the fact that evidence was provided that he had signed for it. He alleged his signature was a forgery. The Claimant also denied asking Mr Abdelaziz for a £3000 loan so the Claimant could bring his mother into the UK from Africa. Evidence was produced of the money going into the Claimant's account. The Claimant maintains that this was part of a deal whereby damaged and repaired cars were shipped to Africa in respect of which the Claimant was the middleman. The Claimant said he could produce evidence of this in the form of bank statements showing where the £3000 was sent by him. There was no such evidence in the bundle, and it was not forthcoming during the hearing.

14. The Claimant was also accused of frequently using his mobile phone in the Respondent's warehouse. He denies this was in relation to private telephone calls and said he only used his mobile phone to take photographs of lorries and pallets being incorrectly loaded or stacked which he would then email to management to alert them as to what was going on. No such evidence in the form of those emails was produced. The Claimant also sought to rely on medical evidence from his GP to support his allegation that some medical conditions arose as a result of things that happened in his employment. The medical evidence was in the form of two separate letters allegedly from his GP practice which were signed by someone who was not named and who's signature is not legible but who is described as the Practice Receptionist.
15. In contrast, we found the evidence of all of the Respondent's witnesses to be given in a straightforward, honest and consistent manner. It was evident to us that Mr Wilkins was deeply upset by the Claimant's allegations of racism given that the Respondent's workforce is multicultural employing people from many ethnic backgrounds.
16. Accordingly, where there was a dispute on the evidence, we preferred the evidence of the Respondent's witnesses.
17. We find the following facts:
  - 17.1. The Claimant, who describes himself as Black African and a Muslim, commenced employment with the Respondent on 16 April 2018 as a Forklift Truck Driver and Warehouse Operative. He was initially employed at the Respondent's Ardon House premises.
  - 17.2. In January 2019, after an aggressive altercation with another employee, the Claimant complained to the Respondent's management that he had been called racist names by a fellow employee, Mr R Lowe, who had said to him "come on nigger just put the pallet on my truck". The aggressive altercation was with another employee, Mr B Slade, who the Claimant said challenged him to a fight. Further, he alleged that his Line Manager, Mr R Walker, told him to "shut the fuck up and get on with your work". The grievance was investigated by the Respondent, by Mr O'Dowd who had written to the Claimant on 22 February 2010 to advise him there would be an investigation and how the Respondent's grievance procedure would be followed (page 91).
  - 17.3. Further witnesses were then interviewed none of whom confirmed the use of any racist language and several of whom indicated that it was the Claimant who had been the aggressor in the altercation with Mr Slade and it

was the Claimant who had challenged Mr Slade to a fight and not the other way round.

17.4. Mr O'Dowd did not uphold the Claimant's grievance and wrote to him on 20 June 2019 (page 116) to give his reasons. In particular, Mr O'Dowd concluded that the Claimant had embellished his grievance to give the impression that he had been called racist names when he had not. Further, Mr O'Dowd concluded that the invitation to have a fight came not from Mr Slade to the Claimant but the other way around.

17.5. In order to alleviate the tensions between the Claimant and other employees the Claimant was transferred to the Respondent's main factory premises a short distance from Ardon House where he continued to undertake the same duties.

17.6. The Claimant indicated that this transfer had resolved his grievances to his satisfaction but then on 17 July 2019 said that he wished to appeal Mr O'Dowd's decision. In a conversation with Mr Wilkins, the Claimant indicated that if he was promoted to a supervisory role and given a salary increase, he would not proceed with his appeal or institute any legal action. The Claimant repeated this to Mr O'Dowd. As a result of these exchanges, Mr Wilkins and Mr O'Dowd considered they would have difficulty in trusting the Claimant going forward.

17.7. The Claimant proceeded with his appeal but gave no grounds for that appeal. Subsequently, in an email dated 1 October 2019 to Mr Wilkins (page 137), the Claimant said "I have taken advice and if I wish I could go to an Employment Tribunal. I have now decided to let the matter drop as a gesture of goodwill towards the Company and hopefully start again from scratch. This matter has affected me greatly for the past 10 months and would now like to move on. I am sure of what was said to me and I have spoken the truth. Rob knows what he said, and I hope he thinks about what he is saying in the future".

17.8. On around 22 July 2019, there was an altercation between the Claimant and Mr Abdelaziz. We find that Mr Abdelaziz had lent £3,000 to the Claimant on the basis that the Claimant needed to pay lawyers to facilitate the entry into the UK of his mother from Africa. Mr Abdelaziz confronted the Claimant at work and a heated argument ensued with Mr Abdelaziz at one point trying to block the Claimant from driving away in his forklift truck to avoid speaking to him. We accept Mr Abdelaziz's evidence of the circumstances in which he lent the money to the Claimant and find that the Claimant's version of events that the money was for a business venture in transporting to and selling in Africa cars which had been damaged and repaired in the UK is a complete fiction. The Claimant also attempted to

borrow money from other colleagues during his employment, none of whom agreed to lend him any money.

17.9. The Claimant had been told by his Supervisor on many occasions to refrain from using his mobile phone in the workplace. Despite this, he ignored that instruction and continued to use his phone. Other employees who were caught using their mobile phones were also told to stop doing so by their Supervisor and complied with that instruction. We find the Claimant's explanation that he was taking work related photographs and emailing them to management to be a fiction. His terms of employment (page 64) clearly state, "personal mobile telephones are not permitted to be carried or used within the factory area; to do so will result in disciplinary action which for the avoidance of doubt may include your dismissal".

17.10. The Respondent provides workwear for its employees. This workwear is replaced periodically but, in the interim, when an employee leaves and returns their workwear, it is properly laundered and made available to new employees. The Claimant was given some items of such workwear which had been properly laundered and was clean. As he did not like wearing this workwear he was also provided with a white coat as a temporary measure. We do not accept the Claimant's account of being given unlaundered workwear or that it produced any skin irritation. The photographic evidence produced by the Claimant of a rash on a leg is unconvincing, not the least because there is no way of confirming it is the Claimant's leg.

17.11. In September 2019 the Claimant had been granted paternity leave due to the birth of his daughter. He did not return on the agreed date claiming that the child had been born later than anticipated and was ill for a few days after birth. We do not accept the Claimant's explanation for his late return to work.

17.12. After the altercation with Mr Abdelaziz in the Respondent's main premises, the Claimant complained to Mr McEwan (page 121) this was investigated by the Respondent, witnesses were interviewed and Mr Abdelaziz was instructed not to visit the main premises (where he did not actually work) to avoid any further incidents over what was considered to be a private arrangement between them.

17.13. On 21 August 2019, Mr McEwan met with Claimant and the notes of that meeting are at page 134. Mr McEwan had given the Claimant a photograph of a damaged pallet of stock to the Claimant with an instruction that he should advise Mr McEwan if any further damaged pallets arrived at the Respondent's premises. Another employee, who the Claimant did not know, was in the picture. Shortly afterwards, the Claimant followed that employee on the bus and approached him saying that he had a photograph of the employee with a damaged pallet and he was in trouble. The employee

concerned reported this incident to the Warehouse General Manager, Mr C Cox. The employee in the picture said that the Claimant showed him it, but the Claimant denied this. The Claimant accepted in his meeting with Mr McEwan that the photograph was in his pocket but said he had since destroyed it. We find that he did show the photograph to the employee and his motive was nothing less than to cause trouble and mistrust.

17.14. The Respondent delayed taking any action against the Claimant whilst his appeal against his grievance decision was outstanding but when he withdrew that appeal (page 137) Mr Wilkins decided to terminate his employment. The letter of termination is at page 139. He was dismissed with immediate effect and paid in lieu of notice. Mr Wilkins gave extensive reasons for the decision to dismiss the Claimant. The reasons set out for the dismissal were the unauthorised paternity leave; his threat, in terms, that if was promoted he would withdraw his appeal and not issue proceedings against the Respondent; taking the photograph and showing it to another employee when that photograph belonged to the Respondent and untruthfully telling the employee concerned that he was in trouble and should watch himself; borrowing money from an employee and failing to pay it back and attempting to borrow money from other employees; using his mobile phone at work; taking extended breaks; and failing to wear his safety shoes and workwear in the factory. Mr Wilkins letter concluded that the Claimant caused too much disruption in the workplace and was not reliable enough or suitable to work with the Respondent.

17.15. By letter dated 15 October 2019 (page 142) the Claimant appealed saying that the real reason for his dismissal "is the colour of my skin". Mr Wilkins replied by letter dated 16 October 2019 (page 143) setting out that the Claimant's race had nothing to do with the termination of his employment. He repeated the allegations that had been made against the Claimant and that his initial grievance had been found to be fictitious. Mr Wilkins confirmed that the dismissal was not a disciplinary decision and, accordingly, the Claimant was not entitled to appeal against it.

### **Submissions**

18. At the conclusion of the evidence, it was agreed that the parties could make written submissions which they duly did. We do not repeat those submissions in detail in this Judgment but confirm that we fully considered them in reaching our conclusions.
19. Essentially, Mr Onyeari submits that the Claimant had established facts from which the Tribunal could conclude that the Claimant was discriminated against and the Respondent had failed to give an adequate investigation. He referred to other matters but, unfortunately, some of them amounted to what appeared



to be new causes of action and others did not reflect the evidence the Tribunal had heard. The reason for this may be that the Tribunal observed during the course of the hearing that Mr Onyari made no notes of evidence and seemed to have misplaced many documents which had been sent to him and admitted immediately before his cross-examination of the Respondent's first witness that he had not read the Respondent's witnesses statements.

20. Mr Howlett identified the apparently new causes of action and new evidence introduced by the Claimant during the hearing and described him as a totally unreliable witness. He submitted it was clear that the reason for the Claimant's dismissal was clearly set out in correspondence from Mr Wilkins and had nothing to do with race. The Claimant's evidence, he submitted, was largely fictitious.

### **Discussion and Conclusions**

21. There are two main issues in this case. The first is whether the Tribunal consider there is any merit in the Claimant's allegations such that he has established facts from which we could find he has been discriminated against (following Igen and Madarassy). This would result in the burden of proof passing to the Respondent who would then have to give an explanation to satisfy us that the conduct complained of did not amount to discrimination.
22. If we find against the Claimant in this respect, we still have to determine the reason or principal reason for the dismissal.
23. We have already described the Claimant's allegations as fictional. We did not believe any of his evidence. In respect of his first grievance, for example, in which he made allegations of racist language and named witnesses, those witnesses denied any such language was used. With regard to the allegation of aggression towards him and challenging him to a fight, the evidence before the Respondent was that it was the Claimant who was the aggressor and who challenged one of his colleagues to a fight.
24. The Claimant also suggested he suffered an accident at work where his knee was injured but he did not report this accident. He denied being issued with workwear, but we preferred the Respondent's evidence that he was. He produced letters signed by his GP's receptionist to prove he had visited his Doctor. We simply cannot accept such evidence, nor do we consider that a Doctor would allow a receptionist to sign documents which amount to medical reports. They are not credible documents.

25. The Claimant's allegation that there was a racist culture within the Respondent emanating from the founder of the business was simply not credible. As already noted, the founder of the business has been dead for over 20 years and, moreover, there was no evidence whatsoever that the founder was a racist. No examples of such conduct were presented to us.
26. Regarding his claim of direct discrimination, the Claimant named a comparator. He said that one of his fellow employees was treated more favourably when he suffered a leg injury than the Claimant was when he said he was suffering with stress. We do not consider that these two issues arose from materially similar circumstances.
27. The most striking example of the Claimant's unreliable evidence was in relation to the money he borrowed from Mr Abdelaziz. The Claimant was simply unable to substantiate his evidence that he was the middleman in a scheme to export cars to Africa. The only evidence that was provided came from Mr Abdelaziz showing the total sum of £3000 being transferred to the Claimant. The Claimant said he had passed that money on but he did not say to whom or when or whether the whole amount was passed on. He said he could provide such evidence, but he did not and we do not accept it existed. We accept entirely the evidence of Mr Abdelaziz that he thought he was providing a short-term loan to enable the Claimant to facilitate the entry of his mother into the UK. It follows, therefore, that we accept the Claimant was in the habit of attempting to borrow money from, or loans guaranteed by, his colleagues.
28. We also accept the evidence that the Claimant attempted to use his grievance against the Respondent's employees as a means of forcing the Respondent to promote him in return for him not taking proceedings against the Respondent. Both of the Respondent's witnesses who gave evidence on the point, Mr Mcewan and Mr Wilkins, were consistent in their evidence and we accept it.
29. In relation to the photograph of another employee with a broken pallet, we consider that the Claimant deliberately set out to cause trouble for the Respondent, he did take the photograph away from the Respondent's premises and did show it to the employee concerned telling him, in terms, to watch his back.
30. Mr McEwan gave evidence that he keeps a log on all employees which is in the form of a confidential document that he updates whenever there is an incident to report. This log in relation to the Claimant is at page 145. This shows a litany of transgressions by the Claimant including not wearing the safety boots he had been provided with, using his mobile phone, leaving early, abusing break times and his failure to attend work.

31. We accept the evidence before us that there was a policy in place by the Respondent that employees in the warehouse could not use mobile phones for health and safety reasons. We do not accept the Claimant's evidence that he only used his mobile phone to take photographs of issues he noted in the workplace in order to forward them on to management. He produced no evidence that he did this.
32. The Tribunal considered all the evidence before us, but we have not recorded every issue in this Judgment. What we do say, however, is that none of the Claimant's evidence was reliable. It is clear to us that he has exaggerated events, turned them around to suit himself and was deliberately argumentative and uncooperative whilst at work. We find there is no evidence before us from which we could find facts which could lead us to find he had been discriminated against. Accordingly, he does not pass the first hurdle in terms of the burden of proof transferring to the Respondent.
33. Accordingly, his claim of direct discrimination fails and is dismissed. Similarly, we did not accept any of his evidence came close to indicating that he had been harassed by anyone at the Respondent. Further, there is no reliable evidence that after doing a protected act by submitting a grievance, he suffered any detriments. We find that those detriments he apparently relies on simply did not happen.
34. The Respondent acted quite properly in waiting for the Claimant to abandon his appeal against the grievance outcome before dismissing him. We find the principal reason for his dismissal was as set out in the dismissal letter (page 139) which we have referred to above. As Mr Wilkins concluded in that letter, the Claimant was the cause of much disruption amongst his colleagues and with the work he was employed to undertake. We accept the Respondent's evidence that the decision to dismiss the Claimant had nothing to do with his race or the isolated act he relied on in respect of his religion or belief claim in relation to fasting which we did not, in any event, accept.
35. For the above reasons, the claims are not well founded and are dismissed.

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Employment Judge M Butler

Date: 12 January 2022

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