EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100047/2017

Held in Glasgow on 8, 9 & 10 April 2019 & 26 June 2019

Employment Judge Frances Eccles
Tribunal Member Peter O'Hagan

Mr F Mutombo-Mpania	**Claimant** **In Person**
Angard Staffing Solutions Ltd	**Respondent** **Represented by** **Dr A Gibson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that (i) the claimant was not discriminated against by the respondent because of his race in terms of section 13 of the Equality Act 2010; (ii) the claimant was not unfairly dismissed by the respondent in terms of section 100 of the Employment Rights Act 1996 (health & safety); (iii) the claimant was not unfairly dismissed by the respondent in terms of section 104 of the Employment Rights Act 1996 (assertion of a statutory right); (iv)

the respondent was in breach of contract by failing to give the claimant notice of his dismissal & (v) the respondent shall pay to the claimant damages of £165.15 (£132.1 5 plus £25% uplift) for breach of contract.

REASONS

BACKGROUND

1. The claim was presented on 12 January 2017. The claimant complained of automatically unfair dismissal; disability discrimination; race discrimination and breach of contract. The claim was resisted. In their response accepted on 10 February 2017 the respondent denied that the claimant had been dismissed. They denied having discriminated against the claimant because of race or disability. They did not accept that the claimant is a disabled person. They denied any breach of contract. Following a preliminary hearing on 24 April 2017 the Tribunal, by judgment dated 30 June 2017, found that the claimant is not a disabled person within the meaning of the Equality Act 2010. The claimant subsequently applied for a preparation time order; strike out and deposit order. The applications were considered by the Tribunal at a preliminary hearing on 23 November 2018. They were refused.

2. The case was listed for a final hearing. On 8, 9 & 10 April 2019 the proceedings were before a full Tribunal. Ms S Jones, Tribunal member was unable to attend the continued hearing on 26 June 2019 due to ill health. Parties were notified of the position and gave their consent to the case proceeding before the employment judge and Tribunal member Mr P O'Hagan.

3. The claimant gave evidence at the final hearing. The claimant is a French speaker. At the claimant's request the Tribunal provided an interpreter, Ms Isabelle Capoulade. The claimant provided a skeleton argument which stood as his evidence in chief. The Tribunal heard evidence from Lorna Walton, Production Control Manager with Royal Mail and Chris Moylan, Account Manager with the respondent. Both of the above witnesses attended the Tribunal in accordance with witness orders granted at the claimant's request.

The respondent called Sam Slatter, Account Director to give evidence on their behalf. Both parties provided the Tribunal with a bundle of productions.

FINDINGS IN FACT

4. The Tribunal found the following material facts to be admitted or proved; the claimant was born in the Democratic Republic of Congo. He is black. On 11 November 2015 the claimant was recruited by the respondent as a flexible resourcing employee. The respondent operates an employment business. They supply temporary workers to Royal Mail. The work offered by the respondent to flexible employees- known as engagements -is subject to the requirements of Royal Mail. The length of engagements can vary from a single shift to a block of shifts during busier times such as Christmas.

5. The respondent gave the claimant a statement of terms and conditions of his contract of employment (C6/33-43). Clause 4 of the claimant's terms and conditions (C6) provides as follows;

4. *Pay*

4.1 You will only be entitled to be paid under this contract in respect of any period during which you are working on an Engagement. The hourly rate of pay for each Engagement will be specified verbally as part of the Engagement Confirmation. You shall only be paid for the hours that you actually worked.

4.2 You will be paid weekly in arrears on the basis of the number of hours worked in the preceding week directly into your nominated bank account.

For the period 23 September to 16 December 2016 (C37/86-96) the claimant was paid an average weekly pay of £451.72 gross and £351.72 net. The respondent also paid an average of £9.90 per week towards the claimant's pension. For the week ending 23 December 2016 the claimant was paid £249.60 gross and £229.47 net (C37/97).

6. The claimant did not have normal working hours. Clause 9.1 of the claimant's terms and conditions (C6) provides as follows;

9. Hours of Work

9.1 You have no normal hours of work, and your hours will vary according to the needs of Angard and the availability of work during an Engagement. Angard is under no obligation to provide you with work, or to provide you with a minimum number of hours work each day or week and you are not obliged to accept any work that is offered. For the avoidance of doubt, this may result in there being days during your employment or during an Engagement where there will be no work for you to perform. However, Angard will endeavour to allocate suitable work to you when it is available.

7. Clause 10 of the claimant's terms and conditions (C6) provides as follows;

10. Sick Absence

10.1 If during an Engagement you are absent through sickness or injury you must notify Angard by telephone as soon as possible that you are unable to work, and of the likely duration of your absence. Ideally this should be before the start of duty and must be no later than the first day of absence. All absences must be covered by appropriate certification.

10.2 In all cases of absence due to sickness or injury once you have accepted an Engagement, a self-certification form, which is available from Angard, must be completed and supplied to Angard. For any such period which lasts for seven consecutive days or more, a doctor's certificate stating the reason for absence must be obtained at your own cost and supplied to Angard. Further certificates must be obtained if the absence continues for longer than the period of the original certificate.

10.3 <u>If you have accepted an Engagement</u> but are unable to work some or all of the hours agreed due to sickness or injury you shall be entitled to receive Statutory Sick Pay (SSP) provided that you satisfy the relevant requirements.

8. From November 2015 to November 2016 the claimant regularly accepted engagements with the respondent. He worked at Royal Mail's Glasgow Mail Centre. The claimant regularly accepted engagements for shifts that finished at 10pm - known as late shifts. In the run up to Christmas 2016, Royal Mail informed the respondent that they required temporary workers to cover night shifts (10pm to 6am) at their Glasgow Mail Centre. The respondent offered their flexible employees, including the claimant, night shifts as required by Royal Mail. On or about 11 November 2016 the claimant accepted an engagement of night shifts for the period 21 November to 13 January 2017.

9. The claimant has essential hypertension. He was concerned about the effect that working night shifts would have on his health. On 11 November 2016 the claimant contacted the respondent's Sam Clawson by e-mail (C19/63) requesting late as opposed to nightshifts. He informed Sam Clawson as follows:-

**7am writing to let you know of an issue. I have always been on the late shift list at Glasgow Mail Centre working shift finishing at 10pm. However, in the last 2 weeks, it is look like that my name is the night shift list.*

I am writing to advise you that my health condition does not allow me to work regular night shifts. So can you remove my name from the night shift list and take it back in the late shift as usual.

10. The claimant received a response from Sam Clawson later that day (C19/63). Sam Clawson offered him *"late shifts instead".* The claimant agreed to this and on 14 November 2016 received an e mail (C20/64) confirming that his engagement for the week commencing 14 November 2016 had been changed to late shifts.

11. The claimant continued to accept engagements to work night shifts over the Christmas period. He contacted Sam Clawson on 17 November 2016 by e mail (C21/65) as follows;

> *"I am writing to request clarification about my Christmas shifts. In fact, I was already booked to work Christmas night shifts 10:00pm to 6.00am starting on Monday the 21st November till the 13th January 2017. The problem was that my health condition does not allow me to work regular nightshifts, that is why I asked if you can change my nights shifts booking into dayshifts (any one finishing at 10pm).*
>
> *You have sent me an e-mail confirming that you have changed my night shifts to late shifts 5.30pm until 10pm only for this week ending 18 November. You have told me nothing about my Christmas night shifts booking.*
>
> *Can you clarify me about my Christmas night shifts as I was already booked for night shifts 10pm until 6am whereas I asked you to change this to late shifts as my health condition does notallow me to do regular night shifts please.*
>
> *I look forward to hearing from you very shortly. "*

12. The claimant was not offered late shifts for the engagements between 21 November to 13 January 2017. He failed to attend work on 30 November, 4 December, 12 December & 14 December 2016. He had also failed to attend work to cover a late shift on 31 October 2016. On each occasion the claimant did not telephone the respondent in advance to notify them of his inability to attend work. On 15 December 2016 Royal Mail contacted the respondent to report their concerns about the number of occasions on which the claimant had failed to attend work. Royal Mail requested that because of his failure to attend work, the claimant should not be offered any further engagements at their Glasgow Mail Centre. Ayse McKenna, an employment consultant with the respondent, contacted the claimant later that day. She informed the claimant that because he had not followed "reporting procedures" for his

absences from work that he would not be offered any further shifts at the Glasgow Mail Centre. The claimant e-mailed Sam Clawson on 15 December 2016 (R25/186) as follows: -

> *"/ am writing regarding a cail I got today letting me know that I am removed from the Glasgow Mail Centre list and I cannot get any more work, that because I did not attend work last night shift. The first thing I would like to say is sorry for not attending last night shift. That was because of my health condition that I did not attend. Remember that I told you my health condition cannot allow me to work permanent night shift and I have asked to be re-transferred back from night shift to day shift as before, but you did not. I remember I asked before to be transferred from day shift to night shift, you did that unilaterally without my consent.*
>
> *Now because I am working more night shift, sometimes my health condition does not follow the rhythm, you are removing me from the job. I think that is not fair because I told you in advance that permanent night shift will affect sometimes my health condition and that the best time for me to work is day shift.*
>
> *So I would like to ask for your intervention. If you think I am not helpful for night shifts just send me back to day shift as I told you in advance that night shift is not good for me. Removing someone from the job for the consequence of somethings he told you in advance is not fair, and I think as well that it is against my employment agreement.*
>
> *Because there is an emergency, I look forward to hearing from you shortly. "*

13. Ayse McKenna followed up her telephone conversation with the claimant by e mail (C15/59) as follows;

> *uMy name is Ayse I am the consultant from Glasgow, I spoke with yourself earlier about the 3 no shows we have had from you.*

I do apologise about having to remove you from the Glasgow tracker as we need someone who is going to be reliable at this busy time.

I was not aware that you had told Sam you could not work nights, however you could of told me you would not be showing up to your shifts and I could of give you an evening shift 1700-2200.

When I spoke with yourself you had agreed to work the night shift and failed to attend, this has now resulted into me having to remove you from the Glasgow call list at the request of the Royal mail manager.

This is also the Angard policy for everybody.

Once I again I do apologise".

14. The claimant wrote to Ayse McKenna by e mail on 15 December 2016 (C26/187) as follows;

"Thank you for your email. However, I would like to put in your attention the following things:

I am an angard flexible resourcing employee with a contract of employment signed on the 17 November 2016. In the point 2.3 of my contract of employment, it said that you have to give one week notice of termination of employment because I worked more than 4 continuous weeks and less than 2 yours. By terminating my employment without giving me one week notice, you are breaching this contract of engagement;

You can not blame me when there is lack of coordination between you and your order colleges, including Sam. I told Sam that my health condition does not allow me to work permanent night shifts. This means ***I can only work occasional night shifts.*** *I asked to be transferred back to the day shifts where I worked the full year without any problem. You can ask JOSH who was dealing with us before you to came in the last 2 months of the year.*

You cannot ask me to kill my self because you need someone to go to work. I told angard in advance that permanent night shift is not good for my health condition and asked to be retransferred back to day shifts. But you did not do so. It is important to remember you that, when you replace JOSH since the last 2 month of the years, it is you I think who transferred me from day shifts to permanent nights without my consent. You can not obligate me to do somethings which is bad for my health condition. That is against my contract of engagement.

For me, if you still confirm that I can not work any more, in breaching my contract of employment, you are giving no choice from today to take the case to the employment court and believe me, I going to do that without any hesitation from tomorrow.

I regret that sometimes, acting by you, angard staffing is looking only for its own interest without taking care of its employees health condition. May be the employment court will deal with the case properly."

15. The claimant wrote to Ayse McKenna again on 16 December 2016 (C27/1 88) to advise her that in terms of 10.3 of his contract of employment he wished to apply for statutory sick pay for the days he had been unable to work due to sickness. He wrote to as follows;

7 would like to let know that by removing me to work because I have not attend my shift due to health condition or sickness, ***you have breached the point 10.1 and 10.2 of my contract of employment signed on 17 November 2015 between Angard Staffing Solutions Limited and I. These terms give me the right to not attend in case of sickness. The only thing to do is to notify Angard of that idealy before the start of my duty and no later than the first day of my absence.***

Nowhere in my employment contract it said I have to be removed to work if I did not attend due to sickness. ***Moreover, thepoint 10.3 recommend***

you to pay me Statutory Sick Pay and by this email I am applying to get paid SP for the 3 days I have not attend due to sickness.

I would like to remember you as well that I am AWR qualified. That *gives me the same basic working and employment conditions of a comparable permanent Royal Mail employees. Or, never permanent Royal Mail employees are removed from work if they don't attend work due to sickness. By removing me from work because I did not attend work due to sickness whereas I have the same basic working and employment conditions of permanent Royal Mail workers, you are violating the agency workers regulations. "*

16. The claimant's e mails (R25/186; R26/187 & R27/188) were passed to the respondent's team manager, Arran Gautry who attempted to contact the claimant by telephone from 19 to 23 December 2016 without success. Meanwhile the claimant provided the respondent with a statement of fitness to work dated 19 December 2016 (R28/189) confirming that he was unfit to work from 19 December 2 January 2017 because of work related stress. At the respondent's request, the claimant completed a respondent's statutory sick pay claim form (R30/191) confirming that he was absent from work due to "sickness severe high blood pressure" on 14 December 2016 and expected to return to work on 3 January 2017. The claimant submitted the statutory sick pay claim form (R30/191) to the respondent on 21 December 2016. The claimant received statutory sick pay from the respondent for the above period.

17. Arran Gautry wrote to the claimant on 23 December 2016 (R31/195) as follows;-

"As *you are avoiding my calls I have forwarded this the below to our account Management team.*

I have advised you on numerous occasions of the process regarding non-attendance however you are avoiding any responsibility for this, our process is to remove any employee who have failed to not attend

work without notifying us accordingly over three occasions, your most recent instance was your third occasion!

I have looked into this matter over the last week for you where by I have tried to call you to update you on a solution however you have avoided all calls from myself delaying the resolution.

As your contract is a zero hour contract there are no legal obligation to offer you regular work and therefore there is no loss of earning owed to you as the cancellation of shifts is due to you failing to notify us of you Non attendance. Angard staffing have the right to cancel any confirmed shifts within a two hour window from when the shift is expected to start. As your contract is not a guaranteed hours the below calculation is an assumption.

Please see below details from your contract which you have signed:

Hours of Work....

Sick Absence .....

You have also failed to disclose any medical matters on your application form which I am more than happy to send to you as evidence, plus you are failing to inform us of your medical concern/disability which will allow us to support you and make reasonable adjustments.

As per the terms of your contract you are completely correct that we will give you one weeks [1] notice of termination, however what that does not mean that we hold the rights to not cancel any shifts if we have lack of confidence regarding your commitment as we must provide our client, Royal Mail the up most accurate service at all times to avoid risks of not supplying enough employees to cover work load demands and as you

failed to attend work on three occasions since you employment commencement date we have not been left with any other option.

To reiterate we have not breached our employment contract and the decision to not terminate your employment was a decision I made as a good will gesture, allowing you another opportunity to continue working for us however as per my previous communications to you failure to attend a confirmed booking without sufficient notification may result in your contract being terminated.

I would like to confirm that we have received your Sick note from your GP and I am truly sorry for the effect that this matter has caused however this whole situation would of easily been avoided if you replied to the numerous voice mails, followed the correct process in the first place and accepted you did not adhere to the reporting of non attendance of a shift.

I must also make you aware that you are employed by Angard Staffing and not Royal Mail and therefore any concerns/complaints you have need to be addressed for the attention of Angard staffing and not Royal Mail.

Please can you confirm to me what shifts are best for you and if you would like to discuss further please call me directly."

18. The claimant replied to Arran Gautry (R31/1 92) later that day as follows;

"Thank you for your email. I am consoled to read you finally. Firstly, I would like to let you know that I spent all my time by trying to contact you by phone 5 times on the 21st December 2016 and I was not able to reach you being told all time that you were in meeting until when I called the last time at 19:22 to be told you went home.

However, I would like to put in your attention for clarification the following things:

- *On the 15th December 2016, I* was *notified by phone and email at 1:16 PM exactly by Ayse McKenna that I have been removed from work at Glasgow Mail Centre with immediate effect because I did not attend my night shift the day before. I have attached a copy of Ayse McKenna's email for your information. The problem is there.* ***The breach of my contract of employment has arisen at that time. The direct work consequence of this decision was that I was not authorised to attend work at Glasgow Mail Centre the rest of the week whereas I was booked the full week. That is the problem***

- *It is by that decision and its direct work consequence that my contract of employment has been breached in its point 3.1.2. In fact the right procedure should be to give me one week notice of termination as set in my contract of employment instead to remove me directly from work. Therefore you have breached without discussion my contract of employment by that decision on the 15th December 2016.* ***I you have changed your mind after that I told you that you have breached my contract of employment is another things. The breach of contract was already established by the notification to me of that decision and by the interdiction to attend any more shifts I was already booked for.***

- *The wrongful dismissal, the discrimination dismissal and the unfair dismissal are the consequence of your decision of 15 December 2016 at 1:16 pm. If you have changed your mind 5 days after I told you that you were in fault by taking your decision of the 15th December 2016 that does not correct what you have done 5 days before.*

- *By the simple fact that you have not given me one week notice before your decision of the 15th December 2016 or in this decision*

by allowing to go to work for one week as notice and then after terminate my contract, you have to pay me for loss of earnings due to your breach of my contract of employment. ***The loss is evaluated at £802.28 that I am expecting to be paid for by Friday the 30 December 2016.***

- *About the disability, I would like to let you know that life is dynamic but not static. You cannot have any disability today and get that after 2 weeks' time. No one has control of that except god. If you have checked my application which is old of at least one year, you can understand that after one year lot of things can happen.*

- *However, the wrongful dismissal, the discrimination and the automatic unfair dismissal have nothing to do with my disability but with* ***the way you have decided to end my contract of employment by breaching my contract of employment, the agency worker regulation as already explained in my precedent letters, the Royal Mall and Angard Staffing attendance policy,*** *all that by your decision notified of 15 December 2016.*

- *If you have decide to rehabilitate me to work, it is one thing I was asking for correction. However, I am still applying to my other demands as explained in precedent letters.*

- *Finally, I would like to let you know that your decision of 15 December 2016 has aggravated seriously my health condition so much so that my GP has declared I am not fit to work for a certain period of time. So I must claim damages payment for that according to the law.*

- *For the rest, I am reconducting all my demand as set in my precedent letters. "*

19. Arran Gautry replied to the claimant on 23 December 2016 (R31/196) as follows;

> *7 have acknowledged the termination e-mail from Ayse as she sent it once I agreed to it as due to you failing to follow reporting procedures.*
>
> *You will see from that original e-mail from Ayse that she confirmed your contract of employment with Angard Staffing will be terminated due to failure of reporting non-attendance over three occasions. There was no mention of final date whereby you are no longer an employee of Angard Staffing as it takes one week for your P45 to be generated. Plus as per our conversation I will personally look into the matter for you to continue employment with Angard once I investigate all options for you.*
>
> *I have gone over the numerous emails and there is nothing indicating any breach of our contract, in fact it is yourself who has breached your contract by not reporting your absence correctly however I have confirmed with you on several occasions that I am happy to give you another opportunity which you have failed to acknowledge.*
>
> *The compensation you require is an assumption as you are not guaranteed any hours and unfortunately we will not be considering any compensation for shifts which you have not worked.*
>
> *The best I can do and truly feel I am being extremely fair is to allow your flexible contract with us to continue, If this is not satisfactory then I truly apologise however I would like to now formally confirm that this matter is closed and resolved".*

20. The claimant provided the respondent with statements of fitness to work dated 28 December 2016 (R29/190) and 31 January 2017 (R34/200) confirming that

he was unfit to work from 28 December to 21 February 201 7 because of work related stress.

21. Clause 3 of the claimant's terms and conditions (C6) provides as follows;

> ***3. Termination of Employment***
>
> *3. 1 Your employment under this statement shall commence on the Commencement Date and shall continue, subject to the remaining terms of this statement, until it automatically terminates without the need for further notice if:*
>
> *(a) it is more than 90 days since the Commencement Date and you have not worked on an Engagement; or*
>
> *(b) it is more than 28 days since the end of your last Engagement and you have not worked on another Engagement;*
>
> *3.1.2 by Angard giving you one week's notice if you have four or more week's continuous service but less than two years' continuous service or one day's notice if you have less than four weeks' continuous service; or*
>
> *3.1.3 if you have at least two years' continuous service one week's notice per year of continuous employment up to a maximum of twelve weeks' notice after twelve years' continuous employment;*
>
> *3.1.4 by you giving Angard one week's notice*
>
> *Save that nothing in the above clause shall preclude Angard from terminating your employment without notice or payment of lieu in notice in appropriate circumstances.*

The respondent did not give the claimant notice of termination of his employment on 15 December 2018.

22. Clause 13 of the claimant's terms and conditions (C6) provides as follows;

> ***13. Health & Safety***
>
> *13.1 During an Engagement, you will be required to comply with the rules made to prevent physical injury to yourself or to others arising out of your actions or omissions in the course of an Engagement. The Health and Safety at Work etc. Act 1974 imposes a statutory duty on Angard and you to take reasonable care for the health and safety of yourself and other persons (including members of the public) who may be affected by acts or omission at work. It also obliges you to co-operate as necessary in any steps that Angard must take to discharge its responsibilities under the Act. It is an offence intentionally or recklessly to interfere with or misuse anything that Angard is required to provide under the Act in the interests of health, safety or welfare.*

23. Clause 25.3. of the claimant's terms and conditions (C6) provides as follows;

> *unless prevented by ill-health or other unavoidable cause devote the whole of your working time, attention and abilities to carrying out your duties hereunder and will work such hours as may reasonably be required for the proper performance of your duties.*

24. Clause 25.5 of the claimant's terms and conditions (C6) provides as follows;

> *Breach of any of the provisions in clauses 25. 1-25.4 may lead to disciplinary action including in appropriate cases summary dismissal.*

25. The respondent contacted the claimant by text message about engagements for work outside Glasgow (PR37/21 8) between 16 February 2017 and 12 April 2017. The claimant did not accept any further engagements from the respondent.

26. On 27 April 201 7 (R36/21 1) the claimant wrote to the respondent requesting his P45. He informed the respondent that K/n *fact, I stopped to work for Angard Staffing Solutions Ltd since 15 December 2016. Need my P45 to allow to deal with all matter and necessities of my P45. There is emergency".* The respondent replied that the claimant would receive his P45 within 4 weeks. The claimant was informed that if he had any holidays outstanding that they would be paid to him within two weeks (R36/21 2). The claimant was issued with his P45 on 5 May 2017 (R37/213). The claimant questioned the dates of employment on his P45 - the leaving date was recorded as 2 May 2017. The respondent replied by e-mail dated 23 May 2017 (R39/215) confirming that they were unable to amend the date of leaving recorded on the P45 as it *"reflects the day that the P45 was requested on our system and not the last day of work".* The respondent apologised for any inconvenience this may cause.

27. The claimant has applied for alternative employment since 14 March 2017 (C40/1 05-283). To date his applications have been unsuccessful.

SUBMISSIONS

CLAIMANT'S SUBMISSIONS

28. The claimant provided the Tribunal with written submissions which he supplemented with oral submissions at the hearing. He also referred the Tribunal to his skeleton argument. What follows is a summary of the above. The claimant submitted that from 28 October 2016 he was forced by the respondent to work regular night shifts at Royal Mail Glasgow Mail Centre. He claimed that his name was unilaterally removed from the list of late shift employees and that before then he had worked late shifts because of his health condition and concerns about working night shifts with essential hypertension.

29. The claimant accepted that he did not attend work on 30 November 2016; 4, 12 and 14 December 2016. The claimant submitted however that in terms of

sections 100 of the Employment Rights Act 1996 ("ERA") and 2(7) (a) of the Health & Safety at Work Act 1974 ("HSE") and in accordance with clauses 13.1 and 25.3.1 of his contract of employment he had the right to time off work due to ill health. The claimant submitted that on 15 December 2016 the respondent terminated his contract of employment in breach of Clauses 3.1.2, 13.1, 25.3.1 and 25.5. In addition, submitted the claimant, the respondent failed to follow their disciplinary procedure before dismissing him. His contract of employment having been terminated on 15 December 2016, submitted the claimant, there was no new contract of employment signed between the parties to reinstate their relationship and he did not consent to any reinstatement of his contract of employment.

30. The claimant submitted that he was notified by Ayse McKenna of his dismissal by telephone and subsequent e-mail on 15 December 2016. The claimant referred to Sam Slatter's evidence at the preliminary hearing on 24 April 2017 during which he acknowledged that Ayse McKenna informed him that his contract of employment had been terminated. It has never been denied by the respondent, submitted the claimant, that an e-mail was sent to him on 15 December 2016 by Ayse McKenna confirming that his employment had been terminated. The claimant challenged the evidence of Sam Slatter at the final hearing to the extent that he sought to argue that Arran Gautry and Ayse McKenna were not entitled to dismiss him on 15 December 2016. The claimant submitted that the respondent is vicariously liable for the actions of Arran Gautry and Ayse McKenna. They were acting in the course of their employment when they terminated his contract of employment. The claimant submitted that in terms of Section 95(1) (a) of ERA he was dismissed on 15 December 2016 by the respondent. The claimant submitted that the facts of the case support his analysis.

31. In relation to his claim of direct race discrimination, the claimant submitted that he was treated less favourably by the respondent because of his colour. The claimant identified the less favourable treatment as dismissal, failure by the respondent to follow their disciplinary procedure before dismissal and dismissal without notice. The claimant identified Sam Slatter as his

comparator. He did so on the basis that Sam Slatter is white and at the time of the alleged less favourable treatment was employed by the respondent as a manager. The claimant referred to the evidence of Sam Slatter regarding his entitlement to sick leave if sick; that he was not dismissed by the respondent for taking sick leave and that he would not be dismissed by the respondent before they had completed their disciplinary procedure and without notice. The claimant compared his treatment to that of Sam Slatter. The claimant submitted that he was dismissed on 15 December 2016 because he took sick leave and was dismissed without any disciplinary procedure and notice. The claimant submitted that it is clear his treatment was less favourable than that of Sam Slatter in the same circumstances. He submitted that the treatment was deliberate and intended to punish him as a black employee. Any reason for the difference of treatment between himself and Sam Slatter, submitted the claimant, is that he is black, and Sam Slatter is white. The claimant submitted that it is permissible to conclude that racial discrimination occurred on 15 December 2016 or in other words it is clear that he has been racially discriminated against by the respondent's actions and decision to dismiss him on 15 December 2016. The claimant submitted that as a consequence of the respondent's acts of race discrimination on 15 December 2016, he has suffered and continues to suffer serious injury to feelings which he described as being characterised by stress and unstable blood pressure.

32. In relation to his claim of automatically unfair dismissal the claimant referred to Sam Slatter's evidence that the claimant was entitled to sick leave when unwell and could not be dismissed for asserting his "*universal natural right and implied statutory right'.* The claimant submitted that despite this, he was dismissed on 15 December 2016 by exercising his statutory right to time off work due to illness or sick leave. The claimant submitted that in these circumstances his dismissal was automatically unfair.

33. Similarly, submitted the claimant his dismissal was automatically unfair as the respondent breached its statutory duty in terms of section 2(1) of HSE. Notwithstanding its statutory duty to care for the health and safety at work of

its employees, submitted the claimant, the respondent without any reason failed in this respect by not making further enquiries to ascertain information and gain an understanding of his health condition and its impact on his ability to work night shifts. In support of the above submission the claimant referred to passages from earlier decisions of the Tribunal and EAT. The respondent, submitted the claimant, dismissed him by breaching its statutory duty of care in terms of section 2(1) of HSE. The respondent, submitted the claimant, forced him to work night shift in circumstances where they had been informed that this was putting him at a serious health risk by adversely affecting his health condition. The fact the he did not attend work because he was sick was evidence, submitted the claimant of how night shifts negatively affected his health condition. His dismissal in these circumstances, submitted the claimant, was automatically unfair.

34. The claimant also submitted that he was automatically unfairly dismissed for asserting a statutory right in terms section 7 of HSE. He submitted that working night shifts was putting his health at serious risk and adversely affecting his health condition. To protect himself against this danger, submitted the claimant, he asserted his statutory duty in terms of section 7 of HSE by taking care of his health and safety. Taking action to care for his own health and safety, submitted the claimant, resulted in him avoiding attendance at work on night shifts. The respondent automatically unfairly dismissed him, submitted the claimant, because he had asserted his duty to take care of his health and safety.

35. The claimant also submitted that he was automatically unfairly dismissed by the respondent for asserting a statutory right in terms of section 100(1)(e) of ERA. The claimant submitted that having to work night shifts was dangerous given the adverse effect such work had on his health. The claimant submitted that the work at Royal Mail's Glasgow Mail Centre was very demanding and physical. The claimant submitted that working night shifts in these conditions adversely affected his health condition of essential hypertension. The claimant submitted that he took appropriate steps to protect himself given the impact that working night shifts had on his health and which he reasonably

believed to be serious and imminent. This, submitted the claimant, led him to take action which resulted in him avoiding attendance on night shifts. The claimant referred the Tribunal to the case **Mr K Oudahar v Esporta Group Ltd UKEAT/0566/10** in support of his submission that it is irrelevant that the employer disagrees with the employee about the existence of the danger or the appropriateness of the steps taken by the employee. It is sufficient, submitted the claimant, if the employee's belief and the danger is genuine and the steps taken were in fact appropriate. The claimant submitted that he was summarily dismissed by the respondent in response to the assertion of his statutory right to protect himself against the danger he reasonably believed to be serious and imminent. His dismissal, submitted the claimant, was therefore automatically unfair.

36. In addition, submitted the claimant, he was dismissed under section 104(1)(b) of ERA for asserting his statutory right in terms of section 100 of ERA; section 7 of HSE and his *"natural and statutory right to "time off work due to ill-health condition (statutory sick leave)".* The claimant submitted that in response to the assertion of his statutory rights, the respondent dismissed him. The claimant described the *"allegation of the infringement"* as having occurred after *"the infringement"* took place on 15 December 2016 when he was informed by Ayse McKenna that his contract of employment had been terminated. The claimant submitted that in in response to Ayse McKenna's telephone call, he had alleged that by dismissing him the respondent had infringed his statutory rights. The respondent, submitted the claimant, ignored his allegation and confirmed the termination of his contract in Ayse McKenna's subsequent e mail. His dismissal in these circumstances, submitted the claimant, was automatically unfair.

37. The claimant submitted that the respondent also wrongfully dismissed him on the grounds that clause 3.1.2 of the contract of employment imposed on them the obligation to give him one week's notice of dismissal. The claimant submitted that he had more than 4 weeks' continuous employment but less than 2 years' continuous service when dismissed. The respondent was therefore obliged to compensate the claimant for their breach of contract. The

respondent submitted the claimant should compensate him by the amount equal to what he would have earned had he worked the notice period including all benefits such as holiday and pension. Since he did not have normal working hours under the contract of employment, submitted the claimant, the respondent is liable to pay him the equivalent of a week's pay. The claimant referred the Tribunal to section 89(1) of ERA. The claimant submitted that the amount of a week's pay should be calculated in accordance with section 224(2) (a) of ERA because he did not have normal working hours.

38. The claimant further submitted that the respondent breached clauses 25.3.1 and 25.5 of his contract of employment. The claimant submitted that clause 25.3.1 of his contract of employment gave him the contractual right not to perform his duties and obligations if prevented by ill health or other unavoidable cause. In conjunction with clauses 25.1 and 25.3.1, submitted the claimant, clause 25.5 of his contract of employment obliges the respondent to take disciplinary action against him and to impose disciplinary action if the claimant breaches any provisions in clauses 25.1 to 25.4 as opposed to summarily dismissing him without any disciplinary procedure. The claimant described the obligation to apply the disciplinary procedure as mandatory. This included, submitted the claimant, circumstances in which the respondent believed that the claimant had breached clause 25.3.1 of the contract of employment by not working when he was sick. The claimant submitted that by dismissing him on 15 December 201 6 the respondent totally ignored the above clauses. Had they followed the clauses, the claimant submitted that he would not have been dismissed for at least 2 years or 104 weeks. His loss of earnings therefore, submitted the claimant, was equivalent to 104 weeks, exceeding the maximum compensation for breach of contract of £25,000.

39. The claimant submitted that throughout the proceedings, the respondent has been totally dishonest and that their evidence should therefore be disregarded, and a finding made that they have acted unreasonably. The claimant submitted that at stages in the proceedings the respondent has engaged in fraud by falsifying and forging documents that they presented as

genuine evidence in particular at the preliminary hearing on 24 April 2017. The claimant submitted that Arran Gautry's e-mail (C16/60) is an important piece of evidence because it shows that he was dismissed by Ayse McKenna in conjunction with the team manager on 15 December 2016. It is the claimant's position that the respondent fraudulently altered and forged the above e-mail (C16/60) by removing the first line. The respondent's position that the deletion was in error, submitted the claimant, is why he requested a witness order to call the respondent's employee, Chris Moylan, who was responsible for the deletion.

40. The claimant submitted that the respondent has also deliberately lied to the Tribunal about their receipt of another important e-mail that he sent to Sam Clawson on 11 November 2016 (C19/63) in which he requested that he be removed from the night shift list and transferred to the late shift. The respondent deliberately lied to the Tribunal by denying receipt of the e-mail (C19/63) in their grounds of resistance, submitted the claimant; this was notwithstanding Sam Clawson having acknowledged receipt. The respondent's witnesses confirmed at the preliminary hearing on 24 April 2017, submitted the claimant, that they had received his e-mail of 11 November (C19/63) and 17 November 2016 (C21/65). The respondent also lied to the Tribunal in its grounds of resistance, submitted the claimant, by denying that he was dismissed. He referred to the evidence of Sam Slatter before the Tribunal on 24 April 2017 during which he acknowledged in cross-examination that he had been informed by Ayse McKenna that his contract of employment was terminated, a fact which was confirmed by the respondent's representative on 13 December 2017 by e-mail to the EAT (C1/1). In the same e-mail (C1/1), submitted the claimant, the respondent's representative confirms that they have never at any stage denied an e-mail was sent to the claimant on 15 December 2016 by Ayse McKenna confirming that his employment was terminated. The claimant also referred to the e-mail sent to him by Arran Gautry on 23 December 2016 in which, he submitted, Arran Gautry acknowledged that he had instructed Ayse McKenna to notify him that his contract of employment had been terminated. The first line in the original version of that e-mail is evidence of this, submitted the claimant.

41. In conclusion, the claimant submitted that he suspects the respondent lied to this Tribunal by asserting that it was a manager from Royal Mail's Glasgow Mail Centre who instructed them to dismiss him. The claimant referred to the respondent's inability to disclose evidence to support this assertion. It is also the position, submitted the claimant, that Royal Mail have been unable to disclose an e-mail sent to the respondent on 15 December 2016 confirming that they did not wish him to be allocated any further shifts. This is notwithstanding the Tribunal's Order for disclosure of any such e-mail, submitted the claimant.

42. The claimant described the respondent as having acted totally dishonestly in defending the claim. He referred to the heart of the respondent's defence as a deliberate and cynical falsehood that *"Royal Mail has asked the respondent on 15 December 2016 to dismiss the claimant from working at Royal Mail Glasgow Mail Centre"* The claimant submitted that the respondent knew it was a falsehood and was why he had asked them to provide him with a copy of the email sent by Royal Mail on 15 December 2016 asking them to dismiss him from working at their Glasgow Mail Centre. The claimant submitted that is not surprising that they have been unable to disclose a copy of that email in response to the order made by the Tribunal on 9 April 2019.

43. The claimant submitted that the respondent's behaviour in relation to the purported email from Royal Mail is evidence that it was acting dishonestly in defending the claim and that their evidence is not credible. The claimant referred to his various requests for disclosure of the e mail. It was not until the final hearing on 9 April 2019 that the respondent's representative acknowledged that he did not have the e-mail submitted the claimant. The e mail, submitted the claimant, has never existed and the respondent was simply lying to the Tribunal and *"totally dishonest".* The claimant submitted that the respondent's falsehood in relation to their receipt of an email is sufficiently serious to undermine the truth and merit of their entire defence on the basis that a *"party's falsehood or other fraud in the preparation and presentation of his case is receivable against him as an indication of his consciousness that his case is an unfounded one".* The claimant submitted

that the Tribunal should infer from this that the defence lacks truth and merit in relation to all of the alleged facts constituting the defence. The Tribunal, submitted the claimant, should dismiss the entire defence advanced by the respondent for lack of truth and merit.

44. The claimant provided the Tribunal with a Schedule of Loss to June 2019. The claimant submitted that he was entitled to a basic award of £676.80; compensation of £781 ,140 (£624,912 with a statutory uplift of 25%); injury to feelings of £30,000; £25,000 for breach of contract and £564.65 (£451 .72 with a statutory uplift of 25%) for wrongful dismissal.

RESPONDENT'S SUBMISSIONS

45. Dr Gibson for the respondent made oral submissions. What follows is a summary of the above. Dr Gibson submitted that the Tribunal must begin by determining whether the claimant was in fact dismissed on 15 December 201 6 in terms of Section 95 of ERA. Only if the Tribunal finds that the claimant was dismissed, submitted Dr Gibson, must it ask itself whether the respondent was liable to pay the claimant one week's notice.

46. Dr Gibson submitted that the respondent does not dispute that the claimant was sent an e-mail on 15 December 2016 (C15/59) to inform him that Royal Mail had contacted them and no longer wished him to be offered engagements. Dr Gibson rejected any suggestion by the claimant therefore that he did not have evidence of the manner in which the respondent was informed by Royal Mail of their concerns about his reliability. The respondent also accepts, submitted Dr Gibson, that the claimant was sent Arran Gautry's email of 23 December 2016 (C16/60). Dr Gibson submitted that the claimant was not dismissed on 15 December 2016. He referred to the claimant having been paid statutory sick pay by the respondent on the days he was unable to work and which he accepted for the period 19 December 2016 to 3 January 2017. The claimant submitted sick lines submitted Dr Gibson in order to claim statutory sick pay and was advised on several occasions that he would *"get another opportunity"* . The contract of employment between the parties submitted Dr Gibson was terminated on 2 May 2017 following a request by

the claimant for his P45. There were numerous texts, submitted Dr Gibson, sent to the claimant offering him placements in other Royal Mail sites in the West of Scotland. The e-mail dated 23 December 2016 (C60) from Arran Gautry makes it clear that notwithstanding the e-mail of 15 December 2016 (C59) the claimant would continue to be offered shifts and remain in the respondent's employment. Dr Gibson submitted that these circumstances could not amount to termination of employment on 15 December 2016 in terms of section 95 of ERA. The claimant continued to receive remuneration by way of statutory sick pay for engagements he did not fulfil. Why if the employment relationship had ended, submitted Dr Gibson, would the claimant submit a sick note covering him to mid-January 2017? These are the claimant's own actions which support the respondent's position that the contract of employment remained in place, submitted Dr Gibson; the claimant cannot have it both ways.

47. In any event submitted Dr Gibson, even if the claimant was dismissed on 15 December 2016 the respondent does not accept they were required to give him notice. The claimant requested his P45 on 27 April 2017 and the respondent proceeded on the basis that he was dismissed on 2 May 2017. The claimant effectively resigned on 27 April 2017, submitted Dr Gibson. The claimant was on a zero hours contract. He was not therefore entitled to one week's pay, submitted Dr Gibson. There was no evidence of him having been offered work that he could have accepted during that period. It was unclear, submitted Dr Gibson, the basis on which the claimant is claiming notice pay for the week following 15 December 2016 given that he was being paid, albeit statutory sick pay.

48. As regards the contract claim, Dr Gibson noted that the respondent refers to two express terms in his contract of employment namely clause 25.3 and 25.5 which are to be read in conjunction with 25.1 and 25.3.1. It is the claimant's position in his ET1, submitted Dr Gibson, that by dismissing him with immediate effect for not attending work due to ill health, the claimant has exercised a contractual right in terms of which the respondent has breached the above clause. Dr Gibson submitted that in fact clause 25.3.1 is a

statement of what is expected of the claimant during an engagement. The argument that it would be wrong to dismiss the claimant with immediate effect because he is prevented from attending work due to ill health is without merit, submitted Dr Gibson. Firstly, the claimant was not dismissed and secondly, nothing was expected of the claimant while on an engagement as he did not attend work. Clause 25.3.1 places an obligation on the claimant, submitted Dr Gibson. The clause does not create a contractual right. It is an obligation on the claimant during an engagement. The obligation to attend work is effectively removed if he is unwell. The situation here, submitted Dr Gibson, is that the claimant did not inform anyone that he was unable to attend work.

49. Royal Mail asked that the claimant should not be allocated further shifts because he failed to attend work, submitted Dr Gibson. The claimant's failure to notify them of his inability to attend work caused the respondent concerns, submitted Dr Gibson. They were denied the opportunity to get a replacement. There are reputation issues for the respondent. Had the claimant followed the notification process, submitted Dr Gibson, Royal Mail may not have been as worried by the claimant's failure to attend shifts. If the claimant was dismissed, submitted Dr Gibson, it was not because he did not attend work due to ill health. If he was dismissed, which was denied, it was because he did not follow the correct notification procedure resulting in Royal Mail no longer wanting him to be allocated shifts at their Glasgow Mail Centre. The claimant, submitted Dr Gibson, does not appear to deny this. The claimant refers to his email from November 2016 submitted Dr Gibson (C21/65). These do not meet the notification procedure, submitted Dr Gibson. The claimant accepted a block of night shifts. Had he not agreed to accept them, they would not have been allocated to him, submitted Dr Gibson.

50. Regarding Clause 25.5 of the contract of employment, it is the claimant's position submitted Dr Gibson that the respondent was in breach of contract by dismissing him without following their disciplinary procedure. This claim is also without merit submitted Dr Gibson. The clause states that breach of the contract "may lead to disciplinary action". There is a discretion submitted Dr Gibson. To claim the employer is in breach of contract in these circumstances

submitted Dr Gibson is misconceived. The respondent accepts they had concerns when Royal Mail told them that the claimant had not complied with the absence notification procedure. The respondent's response to this however was to give the claimant another chance as recorded in their email of 23 December 2016 (R31/196), not to dismiss him.

51. As regards the claim of automatically unfair dismissal for a health and safety reason, Dr Gibson submitted that the claimant did not attend work due to ill health. It is the respondent's position that if he was dismissed it was because he did not follow the notification procedure. In terms of the claim under section 100(1)(e) of ERA, the respondent fails, submitted Dr Gibson to understand how on any view not attending work due to ill health could ever amount to circumstances of danger which the employee was reasonably entitled to believe would be serious or imminent. Where the claimant's case so obviously fails, submitted Dr Gibson, is that there have to be circumstances of danger which are serious and imminent. This cannot be the case for the claimant', submitted Dr Gibson, as he was not in the workplace. The claimant could not have reasonably believed that to attend work would place him in a state of danger. The right not to be dismissed for health and safety reasons is there to protect people who act in circumstances of danger which are serious and imminent, submitted Dr Gibson. The claimant, submitted Dr Gibson, was at home unable to work due to high blood pressure. This situation, submitted Dr Gibson, does not meet the requirements of section 100(1)(e) of ERA.

52. In relation to section 104(1)(b) of ERA Dr Gibson submitted that he was unable to identify any evidence from the claimant of having alleged the respondent infringed a statutory right. In any event, submitted Dr Gibson, it is clear that the obligation must arise at work. The claimant was not at work, submitted Dr Gibson. He was off sick. There was no evidence, submitted Dr Gibson, of the claimant being denied the right to adequate sick leave entitlement, which in any event is not a statutory right submitted Dr Gibson. . If it is a statutory right which the claimant sought to enforce, submitted Dr Gibson, there was no evidence of the claimant alleging an infringement.

53. Similar observations applied to the claim under section 7 of HSE submitted Dr Gibson. Again, this is a statutory obligation placed on an employer not a statutory right of an employee. It only applies when the employee is at work. The claimant was not at work. If the claimant had been forced to work while sick, submitted Dr Gibson, this could have amounted to a health and safety issue. There was no evidence however that the claimant was attending work in such circumstances, submitted Dr Gibson.

54. As regards the race discrimination claim, Dr Gibson submitted there is simply no evidence from the claimant to suggest that anything done by the respondent was because of the claimant's race. The claimant, submitted Dr Gibson, has led no evidence to support this claim. The burden of proof is on the claimant submitted Dr Gibson to set out a *prima facie* case. Taking the claimant's claim at its highest, submitted Dr Gibson, if there is an absence of any explanation, the claimant does not state that Ayse McKenna, Arran Gautry or anyone at Royal Mail had any discriminatory intention towards him. There is no evidence, submitted Dr Gibson, of inappropriate action submitted Dr Gibson. The absence of an explanation does not overcome the lack of a *prima facie* case, submitted Dr Gibson. The respondent has in any event set out clearly how they treated the claimant in the way they did, submitted Dr Gibson; it had nothing to do with race.

55. Dr Gibson challenged the accuracy of the figures in the schedule of loss provided by the claimant. He described the sums claimed by the claimant to be grossly inflated and evidence of the claimant's approach to the proceedings. There was no evidence of mitigation of loss submitted Dr Gibson.

ISSUES

56. The issues before the Tribunal were as follows:

1. Was the claimant dismissed on 15 December 2016?

2. If so, was the reason, or if more than one the principal reason, for the claimant's dismissal;

(i) because of his race;

(ii) for a health and safety reason or

(iii) because he sought to enforce a statutory right

3. If the claimant was dismissed, was the respondent in breach of contract by failing to follow their disciplinary procedure and/or by not giving the claimant notice?

4. If the claimant was dismissed, did the respondent act less favourably towards the claimant because of his race by dismissing him; failing to follow their disciplinary procedure and/or by not giving him notice?

5. What remedy, if appropriate, should be awarded to the claimant?

NOTES ON EVIDENCE

57. Central to this case was whether the claimant's contract of employment with the respondent terminated on 15 December 2016. According to the claimant, the principal reason for his dismissal was unlawful either because it related to his race; health and safety or because he sought to enforce a statutory right The claimant gave evidence that he had been informed by Ayse McKenna on 15 December 2015 that his contract had been terminated. The Tribunal accepted the claimant's evidence in this respect. It was consistent with Ayse McKenna's subsequent e mail to him later that day in which she apologised *"about having to remove you from the Glasgow tracker as we need someone who is going to be reliable at this busy time".* It was also consistent with the e mail from Arran Gautry (R31/1 96) in which he confirmed;

7 have acknowledged the termination e-mail from Ayse as she sent it once I agreed to it as due to you failing to follow reporting procedures" and

"You will see from that original e-mail from Ayse that she confirmed your contract of employment with Angard Staffing will be terminated due to failure of reporting non-attendance over three occasions".

The Tribunal did not hear from either Ayse McKenna or Arran Gautry. The respondent did not dispute that they wrote to the claimant in the above terms.

58. The respondent relied on the claimant's subsequent conduct to show that the contract of employment had not been terminated. In particular they relied on the claimant applying for and receiving statutory sick pay after 15 December 2016. The Tribunal was not however persuaded that the claimant's conduct was inconsistent with him having been dismissed on 15 December 2016. On 16 December 2016 he applied for statutory sick pay for absences on 4, 10 and 14 December 2016, all dates that preceded the date of dismissal. The subsequent claims for statutory sick pay were submitted after Sam Slatter had contacted the claimant to confirm that he was *"happy to give you another opportunity".* The respondent submitted that this was evidence of continuous employment. In all the circumstances however, the Tribunal was persuaded that the claimant was entitled to conclude that his employment had been terminated on 15 December 2016. While the respondent may have paid the claimant statutory sick pay and offered him further engagements following Sam Slatter's intervention on 23 December 2016, the Tribunal was not persuaded that this amounted to continuity of the claimant's contract of employment (C6) following its termination by Ayse McKenna on 15 December 2016.

59. The claimant challenged the respondent's evidence that Royal Mail requested that he should no longer be offered work at their Glasgow Mail Centre. The claimant had for some time sought evidence from the respondent of an e-mail they claimed to have received from the Royal Mail in which they received the above request. Neither the respondent or Royal Mail were able to produce the e mail in question. Royal Mail failed to comply with an Order issued by the Tribunal on 9 April 2019 for disclosure of the e mail. The claimant relied on this to challenge the respondent's evidence about the

reason for his dismissal. The Tribunal heard from Lorna Walton who gave evidence about the procedure that Royal Mail would follow if they sought to contact the respondent about concerns with flexible workers. Lorna Walton's evidence was clear and persuasive that the procedure followed by Royal Mail was to send an e-mail to the respondent requesting that a flexible worker was no longer assigned to their Glasgow Mail Centre. Lorna Walton was able to identify the Royal Mail employee who would probably have sent an e mail in the claimant's case when concerns were raised about his failure to attend shifts. The claimant did not challenge her evidence in this respect. On balance the Tribunal was satisfied that the respondent had been contacted by Royal Mail with a request that because of his failure to attend work the claimant was offered no further engagements at their Glasgow Mail Centre. It was consistent with the e mail from Ayse McKenna informing the claimant that his failure to attend work had *"now resulted into me having to remove you from the Glasgow call list at the request of the Royal mail manager".* It was consistent with the claimant's own e mail about the call from Ayse McKenna of 15 December *"letting me know that I am removed from the Glasgow Mail Centre list and I cannot get any more work, that because I did not attend work last night shift".*

60. The claimant submitted that the Tribunal should draw an adverse inference from failure on the part of Royal Mail and the respondent to produce a copy of the e-mail in which Royal Mail were said to have requested that he was no longer offered work at the Glasgow Mail Centre. For the reasons given above however, the Tribunal was not persuaded from the evidence before it that the respondent had not received a request from Royal Mail to no longer offer the claimant engagements on account of his failure to attend work. Lorna Walton was clear in her evidence that this was the situation in the claimant's case. While the e-mail that was said to have contained the request could not be produced, the Tribunal was unable to conclude that in all the circumstances no such request had been made by Royal Mail. Similarly, the Tribunal was not persuaded that it should draw an adverse inference from the failure on

the part of the respondent to produce the e mail in question when considering the reason for the claimant's dismissal.

61. Concerns were also raised by the claimant about the respondent's disclosure at an earlier stage in the proceedings of Arran Gautry's email of 23 December 2016 (C17/61) from which the opening sentence had been deleted. The missing sentence read as follows;

> *I have acknowledged the termination e-mail from Ayse as she sent it once I agreed to it as due to you failing to follow reporting procedures.*

The claimant submitted that the respondent had deliberately deleted the above sentence to avoid any suggestion that his contract had been terminated. The claimant called Chris Moylan to give evidence. Chris Moylan accepted responsibility for deleting the sentence. He explained what he thought had happened - he accidently deleted the sentence when collating and highlighting passages in e mails between the respondent and the claimant. He was honest about the confusion on his part about how this had happened, much of which was due to the passage of time. The claimant submitted that the Tribunal should draw an adverse inference from the explanation provided by the respondent in relation to this matter. While the explanation provided for deletion of the sentence was somewhat convoluted, on balance the Tribunal accepted Chris Moylan's evidence that he had not deleted the sentence deliberately or with any intention to mislead either the claimant or the Tribunal. The e mail was sent to the claimant. It was in his possession. The version of the e mail originally disclosed by the respondent (C17/61) contained the sentence; *"You will see from that original e-mail from Ayse that she confirmed your contract of employment with Angard Staffing will be terminated due to failure of reporting non-attendance over three occasions".* Had Chris Moylan sought to falsify the e mail to hide the fact that the claimant was dismissed, as submitted by the claimant, it seems improbable that he would not have also deleted the above sentence which refers to Ayse McKenna's e mail and identifies the respondent's reason for terminating the contract of employment.

62. The claimant also submitted that the Tribunal should reject the respondent's evidence given their failure to acknowledge receipt of his e mail of 11 November 2016 (C19/63) in their original response to his claim. In the e mail the claimant raised concerns about how his health condition did not allow him to work regular night shifts. It was not in dispute that the e mail did not amount to notification from the claimant about his inability to work specific night shifts. Sam Clawson responded positively to the extent that for a limited period the claimant was offered late shifts. The Tribunal was not persuaded that it should draw an adverse inference from the respondent stating in its response to the claim that it had no record of the e mail of 11 November 2016 (C19/63) or of the claimant reporting anything that might amount to a health and safety issue. The respondent subsequently accepted that the e mail had been sent and received. The respondent's failure to acknowledge receipt of the claimant's e mail of 11 or for that matter 17 November 2016 (C19/63 &C21/65) in their response to the claim, did not lead the Tribunal to conclude that the claimant's dismissal in any way related to his colour as opposed to his failure to attend work because of ill health. The evidence before the Tribunal did not support such a finding.

63. Sam Slatter was cross-examined by the claimant at length. The Tribunal found him to be a credible witness with a detailed understanding of the respondent's procedures. He was also aware of the respondent having been contacted by Royal Mail with concerns that the claimant had failed to attend work as a result of which they did not want him to be offered any further engagements at their Glasgow Mail Centre. The Tribunal accepted his evidence. The claimant attached much weight to the fact that Sam Slatter had stated at an earlier hearing before the Tribunal on 24 April 2018 that he was dismissed on 15 December 201 6. Sam Slatter could not recall giving this evidence but for the above reasons the Tribunal was in any event persuaded that the claimant's contract had been terminated on 15 December 2016. The respondent sought to show that the claimant's contract of employment (C6) had continued after 15 December 2016. While the Tribunal did not accept

their position, it did not conclude that this was sufficient to draw an adverse inference of discrimination. In his correspondence with the claimant (R31/195 &196), Arran Gautry was responding to concerns over treatment he claimed to have received relating to his health. He was responding to demands from the claimant for notice pay. The Tribunal did not find that in these circumstances his response to give the claimant *"another opportunity"* and continue to offer him engagements in any way related to the claimant's colour.

DISCUSSION & DELIBERATIONS

DISMISSAL

64. The Tribunal began by considering whether the claimant was dismissed by the respondent on 15 December 2016. This was less favourable treatment about which the claimant complained in relation to his claim of race discrimination and the basis in which he sought damages for breach of contract. In terms of section 95(1) (a) of the Employment Rights Act 1996 ("ERA") an employee is dismissed by his employer if the contract under which he was employed was terminated by the employer (whether with or without notice). It was not in dispute that on 15 December 2016 the claimant was informed by Ayse Wilson that he would not be offered any further work at Royal Mail's Glasgow Mail Centre. This was followed by an e mail (C59) in which Ayse Wilson informed the claimant that he had been *"removed from the Glasgow tracked* as the respondent needed *"someone who is going to be reliable at this busy time".* Arran Gautry subsequently confirmed the position in his email to the claimant of 23 December 2016 (R31/196) in which he referred to the *"termination email"* from Ayse McKenna and advised the claimant that *"she "confirmed your contract of employment with Angard Staffing will be terminated due to failure of reporting non-attendance over three occasions"*

65. The Tribunal was satisfied that in all the circumstances the claimant was entitled to conclude that his contract of employment had been terminated on 15 December 2016. It was why he contacted Sam Clawson a few hours after

his call with Ayse McKenna (C13/58) requesting his *"intervention".* The Tribunal was not persuaded that because the claimant subsequently requested and received statutory sick pay and did not request his P45 until some months later that his contract of employment (C6) was not terminated on 15 December 2016.

DISMISSAL - RACE DISCRIMINATION

66. The claimant advanced a number of alternative reasons for his dismissal. The Tribunal began by considering whether the reason for the claimant's dismissal was because of his colour. In terms of section 13(1) of the Equality Act 2010 (EA 2010); "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".* Race is a protected characteristic in terms of section 4 of EA 2010. Section 9(1)(b) of EA 2010 provides that colour is included within the meaning of race.

67. It is the claimant's position that by dismissing him the respondent treated him less favourably than they would have treated an employee who is white. In terms of Section 23(1) of EA 2010, for comparison purposes there must be *"no material difference between the circumstances relating to each case".* The claimant identified Sam Slatter as his comparator. Sam Slatter is white and has not been dismissed by the respondent. Sam Slatter however is not a flexible employee. He is a manager. There was no evidence that he had failed to attend a shift with Royal Mail without giving the respondent notice. There was no evidence that Royal Mail had requested that he was not offered any further work at their Glasgow Mail Centre. In these circumstances the Tribunal was not persuaded that Sam Slatter was an appropriate comparator. His circumstances and those of the claimant are materially different. In any event, the Tribunal was satisfied from the evidence before it that on balance a flexible employee who is white would have been treated in the same way as the claimant had they failed to attend shifts with Royal Mail without giving notice and as a result of which Royal Mail had requested that they were not offered any further work. The Tribunal was not persuaded that in all the circumstances

the claimant's dismissal amounted to less favourable treatment within the meaning of section 13(1) of EA 2010. There was no evidence before the Tribunal to show that a hypothetical comparator would have been treated differently by the respondent. In all the circumstances the Tribunal was not persuaded that the claimant's dismissal was less favourable treatment because of his race.

DISMISSAL - AUTOMATICALLY UNFAIR

68. The Tribunal went on to consider the alternative reasons for dismissal advanced by the claimant. The claimant claimed that he was automatically unfairly dismissed in terms of section 100(1)(e) of ERA. Section 100(1)(e) of ERA provides that an employee shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that *"in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from that danger".* The claimant identified the circumstances of danger which he reasonably believed to be serious and imminent as having to work night shifts given the adverse effect such work had on his health condition of essential hypertension.

69. The Tribunal was not persuaded from the evidence before it that there were circumstances of danger which the claimant could reasonably have believed were serious and imminent The claimant had concerns that working night shifts would adversely affect his health. He was not obliged to accept night shifts or attend work if unable to do so due to ill health. He was however obliged to notify the respondent *"as soon as possible"* that he was unable to attend work. It was his failure to give notice of his inability to attend work on 30 November and 4, 12 & 14 December 2016 that resulted in his dismissal. While the claimant had requested that he be returned to late shifts, there was no evidence that either Royal Mail or the respondent would have insisted that the claimant complete a night shift on any of the above dates had he notified them in advance that he was too unwell to attend work. The Tribunal was

unable to conclude in these circumstances that the claimant could reasonably have believed that he was in a situation of serious and imminent danger. In any event, the Tribunal was not persuaded that the appropriate step for the claimant to have taken, if he believed that attending work would place him in serious and imminent danger, was to fail to attend work without giving notice. The appropriate step was to give the respondent notice of his inability to attend work. There was no evidence of the claimant being taken suddenly unwell. It was the claimant's evidence that he has had essential hypertension for some time. He had the condition when he accepted the night shifts. There was no persuasive evidence before the Tribunal as to why the claimant was unable to take the step of notifying the respondent in advance that he was unable to attend the specific night shifts he had accepted and which he failed to attend. In all of the circumstances, the Tribunal was not persuaded that the reason for the claimant's dismissal was automatically unfairly dismissed in terms of section 100(1)(e) of ERA.

70. The claimant also claimed that he was automatically unfairly dismissed by the respondent for asserting a statutory right under Section 104 of ERA. In terms of Section 104(1)(b) of ERA, an employee's dismissal is automatically unfair if the reason or principal reason for the dismissal is that the employee alleged that the employer had infringed a relevant statutory right. The claim to the right must have been made in good faith in terms of section 104(2) of ERA. The employee must make it reasonably clear to the employer what right he claims is being infringed although in terms of section 104(3) of ERA there is no requirement to actually specify the right. Section 104 of ERA however relates to relevant statutory rights. These are identified in section 104(4)(a) of ERA as *"any right conferred by (ERA) for which the remedy for its infringement is by way of a complaint or reference to an employment Tribunal".* Section 104(4)(b) to (e) of ERA identifies relevant statutory rights in various other acts and statutory regulations. The claimant based his claim under section 104 of ERA on having asserted an infringement by the respondent of the *"natural and statutory right"* to *"time off work due to ill health condition or taking "statutory sick* /eave"". He claimed to have asserted an infringement of the

above right by informing the respondent that his health condition prevented him from regularly working on night shifts and requesting that he was moved back to late shifts.

71. The Tribunal was not persuaded that the claim of unfair dismissal for asserting a statutory right was well-founded. Firstly, the Tribunal was not persuaded that the right relied upon by the claimant amounted to a relevant statutory right for the purposes of a claim under section 104 of ERA. The claimant described the right to take sick leave as a *"universal natural right and implied statutory right'.* He did not seek to show that it is one of the statutory rights contained in Section 104(4)(a) to (e) of ERA. The Tribunal had regard to Part VI of ERA which is concerned with statutory rights to time off work. The Tribunal could not find a right in Part VI of ERA to *"time off work due to ill health"* or *"statutory sick leave".* Similarly, the Tribunal was unable to identify such a right in the Working Time Regulations 1998 or the Health & Safety Act 1974. The Tribunal was therefore unable to find that the claimant had alleged that the respondent had infringed a relevant statutory right.

72. If the Tribunal is wrong about this and the right to *"time off work due to ill health condition or "statutory sick leave""* is a statutory right contained in Section 104(4) (a) to (e) of ERA, the Tribunal was not persuaded that the claimant alleged an infringement by the respondent of the above right before his dismissal on 15 December 201 6. It could not therefore follow that this was the reason for his dismissal. It was not in dispute that the claimant raised concerns with the respondent about working night shifts due to his health and requested that he was moved back to the late shift. Even taking into account that the claimant did not have to specify what the right claimed to have been infringed was, the Tribunal was not persuaded that by raising concerns about working night as opposed to late shifts, he had made it reasonably clear to the respondent before his dismissal that they were infringing his right to *"time off work due to ill health condition"* or *"statutory sick leave"".*

73. It was also the claimant's position that he was dismissed by the respondent on the grounds that they breached the general duty of employers to their employees under section 2 of HSE. Section 2 of HSE is not included in the list of relevant statutory rights of the claimant under section 104(4) of ERA for the purposes of proving automatically unfair dismissal. The claimant submitted that the respondent dismissed him by breaching their duty to take reasonable care of his health and safety at work. He submitted that the respondent had breached this statutory duty by forcing him to work night shifts. The claimant also submitted that there was a breach by the respondent of section 7 of HSE. Section 7 of HSE is concerned with the general duty of employees at work. It is not concerned with a statutory right that an employee can rely on to show automatically unfair dismissal under section 104 of ERA. As referred to above, the Tribunal did not find that the respondent had forced the claimant to work night shifts. He was under no obligation to accept night shifts. The claimant was dismissed because he did not give notice that he would not be attending work on various dates in November and December 2016. It was not argued by the claimant that he resigned in response to a breach of health and safety obligations by the respondent. In all the circumstances the Tribunal was not persuaded that the claimant had established that the reason for his dismissal related to health and safety under either sections 100 or 104 of ERA.

BREACH OF CONTRACT

74. The claimant submitted that the respondent was in breach of contract by failing to comply with clauses 3.1.2; 13.1; 25.3.1 & 25.5 of his contract of employment (C6). Clause 3.1.2 required the respondent to give the claimant one week's notice of the termination of his employment. It was not in dispute that the respondent did not give the claimant notice of the termination of his employment. The Tribunal was satisfied that the claimant had a contractual right to one week's notice of termination of his employment. The Tribunal was satisfied that by failing to give the claimant notice, the respondent was in breach of contract. In terms of section 91(5) of ERA, if an employer fails to give the statutory notice required, the rights conferred by sections 87 to 90 of

ERA are to be taken into account when assessing liability for breach of contract. The claimant did not have normal working hours. Section 89(1) of ERA provides that in these circumstances the employer *"is liable to pay the employee for each week of the period of notice a sum not less than a week's pay".* The claimant was incapable of work because of sickness and accordingly the requirement under section 89(2) of ERA to be *"ready and willing to do work of a reasonable nature and amount to earn a week's pa/* did not apply to the claimant. In terms of section 89(3) of ERA the Tribunal must take into account any payment received by the claimant when considering what is due to the claimant as notice pay. From the evidence before it, the Tribunal found that the claimant's net week's pay for the purposes of this calculation was £351 .72 and the amount he was paid during the week following his dismissal on 15 December 2016 was £229.47 net. In these circumstances, the Tribunal calculated that the claimant was entitled to payment of £122.25 plus £9.90 towards his pension payment totalling £132.1 5 as damages for the respondent's breach of contract. The claimant sought an uplift of 25% on the above award under section 207A of TULCRA 1992. The respondent did not seek to show that they had complied with the ACAS Code of Practice on "Disicplinary & Grievance Procedures" 2015. It was the respondent's position that the claimant had not been dismissed; there had been no wrongful dismissal. The Tribunal was not persuaded that in all the circumstances however that the respondent's failure to inform the claimant of *"the appropriate period of notice"* in accordance with the Code of Practice was reasonable. Ayse McKenna informed the claimant on 15 December 2016 that his employment was to be terminated. There was no evidence of the claimant being informed of his contractual right to notice of a week. The Tribunal considered it just and equitable to increase the award by 25% which amounts to £33. The total award to the claimant for breach of contract is therefore £165.15 (£132.15+ £33).

75. Clause 13.1 of the claimant's contract of employment (C6) is concerned with the statutory obligation on the respondent to take reasonable care of the claimant's health and safety while at work under HSE. It does not confer a

contractual right on the claimant in respect of which the tribunal has jurisdiction. For the avoidance of doubt however and for the reasons given above, the Tribunal was not persuaded that the respondent required the claimant to attend work when unwell being the alleged act relied upon by the claimant to establish breach of the respondent's health & safety obligations.

76. Clause 25.3.1 of the claimant's contract of employment (C6) provides that during an engagement the employee shall *"unless prevented by ill-health or other unavoidable cause devote the whole of (your) working time, attention and abilities to carrying out (your) duties hereunder and will work such hours as may reasonably be required for the proper performance of (your) duties".* The claimant submitted that the above clause gave him the right not to perform his contractual duties and obligations if *"prevented by ill-health or other unavoidable cause".* This was not in dispute. Clause 25.3.1 however is concerned with the duties of the claimant as opposed to the respondent under the contract of employment. It was not the respondent's position that they could require the claimant to undertake engagements while unfit to work and the Tribunal did not find that the claimant was required by the respondent to work while unwell. The claimant was dismissed because he failed to give the respondent notice that he was unable to attend work to fulfil engagements due to ill health. The Tribunal was unable to conclude that in all the circumstances there was a breach of clause 25.3.1 by the respondent.

77. Clause 25.5 of the claimant's contract of employment (C6) provides that breach by the employee of any of their duties under clause 25.3 & 25.4 *"may lead to disciplinary action including in appropriate cases summary dismissal".* It was the claimant's position that by failing to take disciplinary action against him the respondent was in breach of contract. The Tribunal was not persuaded that the above clause gave the claimant a contractual right to disciplinary action short of dismissal. The Tribunal accepted that the claimant had been summarily dismissed. There was no evidence that the respondent's disciplinary policy and procedure formed part of the claimant's contract of employment. In any event, clause 25.5 provides that an employee's breach

of the duties contained in clause 25.3 & 25.4 "may" lead to disciplinary action. It was not, as described by the claimant, mandatory. The respondent was not contractually obliged to discipline the claimant by for example requiring him to attend a disciplinary hearing before his dismissal. In all the circumstances therefore, the Tribunal was unable to conclude that the respondent was in breach of clause 25.5 of the claimant's contract of employment (C6).

BREACH OF CONTRACT - RACE DISCRIMINATION

78. The claimant claimed that the respondent's failure to give him notice and apply their disciplinary procedure amounted to less favourable treatment because of his race. For the reasons given above, the Tribunal found that the respondent was in breach of contract by failing to give the claimant notice of his dismissal. It was not in dispute that the respondent did not follow its disciplinary procedure before the claimant's dismissal. The Tribunal did not find however that the respondent's failure to pay notice or follow their disciplinary policy amounted to less favourable treatment because of the claimant's race. The Tribunal was not persuaded that the claimant had identified a valid comparator to establish a prima facie case of discrimination in terms of section 136(2) of ERA 1996. His comparator Sam Slatter had not failed to give notice to the respondent that he was unable to attend work with Royal Mail. Royal Mail had not contacted the respondent to request that Sam Slatter was offered no further work at their Glasgow Mail Centre. In these circumstances, the Tribunal was not persuaded that it was because of the claimant's colour that he was treated less favourably than Sam Slatter by not being given notice and not being the subject of disciplinary action.

79. It was the claimant's position that the only fact that could explain the respondent's behaviour towards him was because he is black. The claimant referred to the respondent's failure to give him notice or follow their disciplinary policy as deliberate and intended to punish him as a black employee. The Tribunal had regard to section 136 of ERA and the burden of proof applicable to claims of direct race discrimination. From the evidence before it, the Tribunal was unable to make findings in fact from which it could

conclude that the respondent had contravened section 13 of ERA. The Tribunal found that the respondent's actions were in response to the claimant's failure to notify them that he was unable to fulfil engagements with Royal Mail. This caused Royal Mail to request that the claimant was not offered any further work at their Glasgow Mail Centre and to the claimant's dismissal for failure to notify the respondent of his inability to attend work to fulfil engagements. The respondent's actions were not because the claimant was black. In all the circumstances, the Tribunal must therefore conclude that the claim of direct race discrimination fails.

CONCLUSION

80. For the above reasons the Tribunal concluded that (i) the claimant had not been discriminated against by the respondent because of his race in terms of section 13 of the Equality Act 2010; (ii) the claimant had not been unfairly dismissed by the respondent either in terms of section 100 of ERA for health & safety reason or section 104 of ERA for assertion of a statutory right and that (iii) the respondent had breached the contract of employment (C6) by failing to give the claimant notice of his dismissal. The Tribunal calculated that the claimant was entitled to damages for £165.15 (£132.15 plus £25% uplift) and accordingly, an award has been made for the above sum.

Employment Judge: Frances Eccles
Date of Judgment: 31 July 2019
Entered in register: 06 August 2019
and copied to parties