EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr B Connor	v	**Clancy Docwra Ltd (company No 00432242)**

Heard at: **Watford** **On:** **22-25 February 2022**

Before: **Employment Judge Bedeau**

Members: **Mrs L Thompson**
Ms B Robinson

Appearance:

For the Claimant: **In Person**
For the Respondent: **Mr P Sangha, counsel**

JUDGMENT having been sent to the parties on 10 March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented to the Tribunal on 14 March 2020, the claimant claimed against the respondent unfair dismissal and race discrimination.
2. In the response the claims are denied. The respondent asserts that the reason for the claimant's dismissal was gross misconduct, in that, he had used racially offensive language and made lewd gestures towards another colleague.
3. At the Preliminary hearing held on 18 February 2021, before Employment Judge Hyams, the claims and issues were clarified. They are unfair dismissal; direct race discrimination; victimisation; and wrongful dismissal.

The issues

4. The claims and issues agreed with the parties at the preliminary hearing are as follows:-

Unfair dismissal

4.1 In the claim of unfair dismissal within the meaning of section 98(4) of the Employment Rights Act 1996 ("ERA 1996"), the following issues will need to be decided:

4.1.1 What was the reason, or principal reason, for the claimant's dismissal? Was it (as the respondent claimed) the claimant's conduct?

4.1.2 Did the person or persons responsible for deciding that the claimant should be dismissed genuinely believe that the claimant had committed that misconduct?

4.1.3 Did the respondent conduct a reasonable investigation into the alleged misconduct of the claimant before deciding that he should be dismissed for that conduct, i.e. was that investigation one which it was within the range of reasonable responses of a reasonable employer to conduct?

4.1.4 Were there reasonable grounds for the belief of whoever decided that the claimant should be dismissed that the claimant had committed the misconduct for which he was in fact dismissed?

4.1.5 Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?

4.1.6 If the claimant's dismissal was unfair,

4.1.7 What compensation should the claimant be awarded for his dismissal under 123 of the ERA 1996 (on the assumption that the respondent would have acted fairly in deciding what to do), and

4.1.8 did the claimant's conduct cause or contribute to his dismissal to such an extent that the basic award and/or the compensatory award within the meaning of (respectively) sections 119 and 123 of the ERA 1996, should be reduced on the basis that it is just and equitable to do so?

Equality Act 2021

4.2 The claimant is claiming that he was directly discriminated against because of his race, contrary to sections 13 and 39 Equality Act 2010 "EqA 2010" and/or victimised within the meaning of section 27 of that Act.

Direct race discrimination

4.3 In the claim of direct race discrimination, the following issues will arise:

4.3.1 Does the claimant rely on the manner in which one or more specific other employees was/were treated as compared with him? Is one of the claimant's comparators, as surmised in paragraph 23 above, Ms Cullinane?

4.3.2 What were the circumstances of that comparator or those comparators?

4.3.3 Has the claimant satisfied the tribunal on the balance of probabilities that there are facts from which the tribunal could draw the inference that his dismissal was to any extent tainted by his race?

4.3.4 If so, applying section 136 of the EqA 2010, has the respondent satisfied the tribunal on the balance of probabilities that the claimant's race had nothing whatsoever to do with his dismissal, i.e. (applying *Igen v Wong* [2005] ICR 931) that the claimant's dismissal was in no way influenced by his race?

4.3.5 Alternatively, applying *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, what was the reason for the claimant's dismissal?

Victimisation

4.4 In the claim of victimisation, the following issues will arise:

4.4.1 Did the claimant do one or more things which constituted a protected act within the meaning of section 27(1) of the EqA 2010? (The respondent may well accept that he did by accusing Ms Cullinane of racially discriminatory conduct towards him on 4 October 2019.)

4.4.2 Was the claimant's dismissal effected to any extent either because he had done a protected act or made a protected disclosure? In answering that question, two alternative questions will arise:

4.4.3 Are there facts from which the tribunal could conclude that the reason why the claimant was dismissed was to any extent either a protected disclosure or a protected act? If so, has the respondent satisfied the tribunal on the balance of probabilities that the respondent's decision that the claimant should be dismissed had nothing whatsoever to do with the fact that he had made a protected disclosure and/or done a protected act? Alternatively:

4.4.4 What was the reason why the claimant was dismissed?

Remedy

4.5 In determining the compensation payable to the claimant in respect of such conduct as the tribunal finds was contrary to the EqA 2010, the tribunal will need to apply the relevant principles in the decision of the Court of Appeal in Abbey National plc and another v Chagger [2009] EWCA Civ 1202, [2010] ICR 397. Those principles will require the tribunal to decide what would, or might, have happened as far as the claimant's future employment was concerned if the claimant had not been treated in the unlawfully discriminatory manner found by the tribunal to have occurred (and, if the claim of unfair dismissal succeeds, on the assumption that the respondent would subsequently have acted fairly in deciding whether the claimant should be dismissed).

The evidence

5 The claimant gave evidence and did not call any witnesses. The respondent called Mr Colin Murray, Planner; Mr Jim Gibson, Supervisor; Ms Melissa Cullinane, Planner; Mr Jason Spinks, Contract Manager; and Ms Nicki Allibhai, Human Resources Business Partner.

6 In addition, the parties produced a joint bundle of documents comprising of over 303 pages. The claimant produced a smaller bundle comprising of 50 pages. References will be made to the documents as numbered in the bundles.

The findings of fact

7 The respondent is a national utility and construction company offering a diverse range of services across the United Kingdom, and is a family owned business. It has been providing services to its client, Thames Water, for over twenty years, such as, clean water, network repair, and maintenance, which includes the repair of small and large water pipelines to commercial and residential properties; the fitting of external water meters; surveying properties before undertaking any work; and reinstating work surfaces on public highways or footpaths after the repairs or maintenance have been carried out.

8 The respondent's disciplinary policy provides a non-exhaustive list of examples of what constitutes gross misconduct entitling it to dismiss without notice or pay in lieu of notice. It includes, "Any act of indecency" and "Any act of discrimination, including any form of racism or harassment". (177-190 of the bundle)

9 The claimant commenced employment with the respondent on 22 September 2011, and at all material times worked as a Scheduler. This required him to close notices for remedial works for the respondent's repair and maintenance business for Thames Water. He was based at the respondent's premises in Brixton, south London and was line managed by Mr Michael Pettitt, former Area Manager.

10 In October 2019, he, Ms Melissa Cullinane, Planner, along with other members of staff, worked in an open plan office wherein they would use of a communal radio. This case concerns a dispute between him and Ms Cullinane over the radio, in particular, the volume control.

11 Ms Cullinane is partially deaf in her left ear and would wear a hearing aid. She preferred that volume on the radio be at such a level so she could hear what was on the radio. This would be higher than what the claimant was prepared to accept which led to the events on 4 October 2019, culminating in his dismissal. They have known each other for at least 6 years.

<u>Events on 4 October 2019</u>

12 At 6.15am on 4 October 2019, Ms Cullinane arrived at her workplace in Brixton and was the first to do so. This enabled her to catch up with her emails. The radio was situated at the far end of the room, by a wall. At some point in the morning after the claimant had arrived, he was engaged in a conversation with Mr Colin Murray, Technical Planner. To Ms Cullinane, the conversation between them was so loud she could not hear what was on the radio. She moved from her desk to the radio and increased the volume. The normal level is between 9-10. As she motioned back towards her desk, she noticed the claimant moved to the radio and turned down the volume, saying that it was "too loud". She responded by saying that "It was not too loud. I could not hear it over the conversation you were having with Colin." According to Ms Cullinane the claimant would normally wear earphones and would be unaware of what was on the radio. Moreover, his desk was at the opposite end of the room from where the radio was sited.

13 He then said to her, "It is not my fault that you are deaf." At that point she became "deeply upset and hurt" by the comment, and felt that he was "mocking". She

responded by saying to him, "not to start with me this morning." As he walked back towards his desk, he turned to face her, and with one hand holding his crutch over his clothing, said loudly, "I am a nigger and you are a racist, and a man knows when a woman cheats, and a nigger knows when someone is racist".

14 We find that Ms Cullinane was extremely upset by the claimant's comment, particularly so as she attended training on Dignity and has a son who is gay and a member of LGBGTQ+. She told us and we accepted her evidence, that she witnessed the hardships her son had to endure because of his sexuality. Moreover, her daughter-in-law is Jamaican with three children who are her grandchildren. She denied saying to the claimant when he was walking back to his desk, "Fucking black bastard" as he claimed. No other witnesses gave evidence that the comment was made by her and we do not find that she said it.

15 As she did not want her colleagues to see how upset she was, she made her way out of the office and was approached by Ms Amina Islam, Planner. Together they walked to the top of the staircase and while Ms Islam was consoling her, she, Ms Islam, encouraged her to report what had happened as she had witnessed it. They were then approached by Mr John Gibson, Supervisor, who asked why Ms Cullinane was crying, to which she told him what had occurred between her and the claimant. He invited her to his office where she said that she wanted to make a complaint. She declined his offer to go home as she had some important work to do. He told her that the incident would be investigated.

16 Mr Gibson then made a written record of what she told him after which he called Ms Nicki Allibhai, Human Resources Business Partner, and informed her of what Ms Cullinane said about the claimant's behaviour towards her. She advised that he should obtain witness statements from those who witnessed the incident, and to avoid further confrontation, to consider whether to suspend the claimant.

17 Mr Gibson then spoke to the claimant with the intention of taking a statement from him, but we find that the claimant's response was to tell him not to get involved as he, Mr Gibson, was not a manager and refused to provide a statement. Mr Gibson was, we further find, the most senior person on the premises at the time. The claimant was suspended by him on full pay but he refused to leave until Mr Gibson had spoken to Ms Allibhai. After the claimant spoke to her he left the premises.

18 Mr Gibson then obtained witness statements from Ms Islam; Ms Emily Bristow, Planner; and Ms Cullinane. Mr Colin Murray, Planner; sent his statement separately to Mr Gibson. (103, 105, 104)

19 The statements were then sent to Ms Alabhai. (108-109)

20 The witnesses all confirmed Ms Cullinane account that the claimant was the aggressor and had accused her of being a racist. He also referred to himself as a "nigger". In Ms Bristow's statement she went further and said that he said to Ms Cullinane that she, "was an embarrassment to your son." She then went on to describe him holding his crutch and shouting, "You don't respect a nigger, you are a racist." She observed Ms Cullinane being so visibly upset, she left the office.

21 When Ms Allibhai spoke to the claimant on 4 October, she explained to him that his suspension was to safeguard the integrity of the investigation and did not infer guilt. He would be given the opportunity to state his case at an investigation

meeting. He did not, at that point, raise a complaint against Ms Cullinane. Later in the day, she wrote to him confirming his suspension. The allegations being,

> "Inappropriate and unacceptable conduct towards a colleague." (111-112)

The investigation

22 Mr Michael Pettitt, former Area Manager, was instructed to carry out the investigation. He was assisted by Mr Paul Burdock, HR Business Partner. They met with the claimant on 11 October 2019. Notes were taken which are not verbatim. The claimant gave his account of the radio incident and said that Ms Cullinane, after she turned up the volume on the radio, pointed her fingers saying, "Fucking go back and sit in your corner", and looking down at her desk said, "Fucking black bastard." It was at that point he called her "a racist and told her a woman knows when her man is cheating and a black man knows when someone is racist." He continued by saying, "This is my instinct." He told Mr Pettitt that he wanted her to be suspended for using racist language against him and that a complaint be made against her. We find that swearing is common in the workplace. (135-137)

23 Mr Pettitt concluded, based on the witness evidence, that the claimant had engaged in the alleged conduct and that his behaviour had fallen short of what was expected of a member of the team, in that, he had cast aspersions on others for no apparent reason. He recommended that that matter be escalated to a disciplinary hearing. (138-139)

The claimant's grievance

24 **On 16 October 2019, the claimant wrote to Ms Allibhai stating that he was trying to get a response to his four complaints against Ms Cullinane but there had been no reply. He stated that he reiterated his complaint at the investigation meeting and was told that they would get back to him. He asked Ms Allibhai for a response as he had been suspended but Ms Cullinane was not despite his complaint. (141)**

25 On 17 October 2019, he was invited by Mr Burdock to attend a grievance meeting scheduled to take place on 24 October. He spoke to Mr Burdock on 23 October saying that it was not necessary for him to attend and preferred that his grievance be investigated. He was, however, encouraged to attend but did not do so.

26 On 5 November Mr Burdock again wrote to him in an attempt to persuade him to attend another grievance meeting. Amongst other things, he wrote with reference to their discussion on 23 October,

> "My advice and response to you was that it would be beneficial for all concerned that you attend as arranged, and urged you to reconsider this decision, given the sole purpose of the meeting was to hear and respond to all of your concerns. I also mentioned that there was no other method or mechanism to achieve this aim given you had lodged a formal grievance under the organisations grievance procedures." (155)

27 Despite Mr Burdock's entreaties, the claimant did not show any willingness to attend a grievance meeting.

28 Following a conversation Mr Burdock had with him, he wrote to the claimant of 22 November 2019, informing him that the grievance was considered under the "modified" procedure and was not upheld as there was the lack of evidence in support of his allegation against Ms Cullinane and his treatment. (161)

29 The claimant appealed the grievance outcome on 28 November 2019 in his joint appeal against his dismissal and grievance. As will be seen below, in paragraph 35 below, he listed 7 grounds.

Disciplinary hearing

30 On 21 October 2019, he was invited by Mr Jason Spinks, Operations Manager, to attend a disciplinary hearing on 25 October 2019. The allegation being,

> "Inappropriate and unacceptable behaviour and conduct towards a colleague relating to a disagreement in which you made lewd gestures and offensive comments." (145-146)

31 The claimant was unable to attend because his mother was ill. The hearing was rearranged for 8 November 2019. He attended and was accompanied by Ms Yolande Joseph, Planner/Administrator. It was chaired by Mr Spinks. Also in attendance was Ms Allibhai. Notes were taken, though not verbatim. The claimant gave his account of events in relation to the volume on the radio during the morning and his interaction with Ms Cullinane on 4 October 2019. He accused her of using racist language towards him by muttering under her breath, "Fucking black bastard". He acknowledged that she had a hearing disability. He further acknowledged that he did not mention the alleged racist comment made by Ms Cullinane on 4 October, as it was only mentioned for the first time at the investigation meeting on 11 October. He said that it was "instinct and intuition" that "a woman knows when her man is cheating and a black man knows when someone is racist." He accepted that he had used the word "nigger" in the workplace but did not consider it to be offensive. He denied making the lewd gesture towards Ms Cullinane by grabbing his genitals.

32 The hearing was adjourned as Mr Spinks found it difficult to understand the points being made by the claimant. He was advised to set out his account in a statement. The hearing was reconvened on 26 November 2019 when all parties attended. The claimant did not produce a statement and insisted that a new investigation should be conducted. During the hearing he repeated his allegations against Ms Cullinane. It was adjourned to enable Mr Spinks to speak Ms Cullinane who confirmed what was in her written statement given on 4 October 2019.

33 Upon reconvening Mr Spinks informed the claimant that, on the balance of probabilities, he found the allegations proved. There was no evidence corroborating his version of events. His conduct and comments were tantamount to gross misconduct. His employment would be summarily terminated. He was informed of his right of appeal against the decision. (162-163)

34 On 27 November 2029, Mr Spinks wrote to him confirming the decision and reasons why he was summarily dismissed. He was not entitled to notice pay. Any outstanding monies and holiday pay would be paid to him. He was again reminded of right to appeal his dismissal. Mr Spinks told us and we accepted hs evidence that he took into account the claimant's length of service, clean disciplinary record and the fact that he was a good worker. He was concerned that the claimant's behaviour may be repeated elsewhere were he to be

relocated. In any event his conduct was so serious that dismissal was the only realistic option. (167-168)

The claimant's appeal

35 The claimant appealed on 28 November 2019 setting out his seven grounds: the manner in which his complaint against Ms Cullinane was conducted; the way in which the investigation meeting on 11 October was carried out; Mr Burdock's grievance outcome; the conduct of the disciplinary hearing on 8 November; the conduct of the reconvened disciplinary hearing on 26 November; the validity of the evidence presented at the investigation, and two disciplinary hearings; and the level of disciplinary action taken. (169)

36 On 2 December 2019, he was invited to attend an appeal hearing on 10 December at the respondent's head office in Harefield as a hearing at the Brixton premises was likely to result in a confrontation between him and his work colleagues. The head office was considered a neutral venue. (172-173)

37 On 4 December, he informed Human Resources that his colleague was unable to attend the hearing at its head office and requested that his appeal be considered on the papers. (174)

38 On 11 December 2019, Sam Payne, HR Business Partner, wrote to him in response to his request and suggested that an appeal meeting could be arranged at its Dartford office or he could clarify his grounds of appeal in writing which would be considered and an outcome given. He was asked to decide on one of the two options by 16 December, but should he wish to provide further written details of his grounds of appeal, he should do so by 18 December 2019. (175)

39 Having received no response from him, Sam Payne wrote to him on 9 January 2020, stating that as the respondent did not receive a reply to the 11 December letter, it would be assumed that he no longer wanted to pursue his appeal and it was deemed that the matter was closed. (176)

40 There was no response from the claimant to the letter.

Secret recordings

41 The claimant had secretly recorded the meetings and did not tell the respondent. For this hearing the recordings have been transcribed and disclosed to the respondent with his annotations, though not the actual recordings. The respondent was in no position to assess their accuracy. (Claimant's bundle)

Credibility

42 In relation to the credibility of witnesses, we were in a position as a Tribunal to observe them when giving evidence including the claimant. We found the evidence given by Ms Cullinane to be credible. When asked recount events in the morning of 4 October, in doing so she became visibly upset and was crying. It clearly touched a raw emotional nerve. During her cross-examination and in response to the Tribunal's questions, she expressed some surprise that the claimant was dismissed for what had happened that morning, and acknowledged that she had used the 'F' word that morning during her dispute with him. She denied using racist language. She was no shrinking violet when giving an account of her behaviour. Her evidence was, however, honest and credible.

43 In relation to the other witnesses, we also take the view that they were credible. The claimant's recollection of events is at odds with the respondent's witnesses' accounts. They corroborated Ms Cullinane account than his.

44 We bear in mind that he had secretly recorded the meetings he attended, the investigation, the disciplinary meetings, contrary to the respondent's policy. He however, produced transcripts of those meetings in an attempt to persuade the Tribunal to accept the contents as fact, without disclosing the recordings to the respondent to compare the accuracy of what he had transcribed. We, therefore, are of the view that the transcripts have very limited evidential value as we had not heard the recordings and are not in a position to assess the accuracy of what had been transcribed. In any event, when we compared the notes of the interviews and disciplinary hearings with those transcribed by the claimant most of the relevant information had already been included in the documents in the joint bundle.

Submissions

45 We have taken into account the submissions by the claimant who challenged the respondent's preparation of the bundle; the radio had two loud speakers; his complaint against Ms Cullinane was not investigated and dealt with as human resources wanted the disciplinary process to be concluded as quickly as possible; the witness statements were not accurate; those involved in the disciplinary process had prejudged the outcome and Mr Spinks was not independent; there was a failure to follow the ACAS Code of Practice on Grievance and Discipline; and the respondent did not offer an appeal hearing either by telephone or video conference and did not consider his appeal letter. Ms Cullinane was treated more favourably as there was no investigation into her conduct, she was not suspended and was not disciplined. She being white, his less favourable treatment was because of his race or race. Having complained about her racist comment he was victimised and dismissed. He should have been given pay in lieu of notice.

46 Mr Sangha, counsel on behalf of the respondent, submitted that Ms Cullinane did not use racist language and having regard to her Jamaican daughter-in-law and her son who is gay, she is aware of how people are treated because they are different and of the issues of diversity; there is a difference between using the "F" word and the claimant's conduct as found; there was a reasonable investigation; Mr Pettitt, Mr Burdock and Mr Spinks were not in the office at the time of the incident; Mr Spinks had to decide on the seriousness of the claimant's conduct as he was independent, he spoke to Ms Cullinane who was consistent in her accounts of the incident; on 8 November 2019, the disciplinary hearing was adjourned to enable the claimant to set out his account in a statement; on the information before him Mr Spinks concluded, on reasonable grounds, that the claimant was guilty of the allegations; the claimant did not attend an appeal hearing; he failed to attend his own grievance hearing; he was fairly dismissed; alternatively if dismissal was unfair he contributed to it; in the circumstance, all claims should be dismissed.

47 We have also considered the authorities they have referred us to.

The law

48. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal

on grounds of conduct is a potentially fair reason, s.98(2)(b). Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employees undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

49. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

    a. First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,

    b. Second whether that genuine belief was based on reasonable grounds,

    c. Third, whether a reasonable investigation had been carried out,

50. Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

51. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

52. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

53. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

54. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark, held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a

reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

55. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's supermarket Ltd v Hitt [2003] ICR 111 CA.

56. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

57. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

58. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer or of adopting a substitution mindset. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was suffering from an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, for the comment made. The employment tribunal found, by a majority, that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.

59. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. "At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

60. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

> "(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."

61. The protected characteristics are set out in section 4 EqA and includes race, disability and religion.

62. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

"There must be no material difference between the circumstances relating to each case."

63. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

64. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

65. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

66. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

67. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all;

evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

68. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

69. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment. This was recently confirmed by the Supreme Court in the case of Royal Mail Group Ltd v Efobi [2021] UKSC 33, Judgment on Lord Leggatt.

70. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

71. The Tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

72. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic?, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.

73. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799.

74. Section 27 states :

> "27 Victimisation
>
> (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) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

75. For there to be unlawful victimisation the protected act must have a significant influence on the employer's decision making, Nagarajan v London Regional Transport [1981] IRLR, Lord Nicholls**.** In determining whether the employee was subjected to a detriment because of doing a protected act, the test is whether the doing of the protected act had a significant influence on the outcome, Underhill J, in Martin v Devonshire Solicitors [2011] ICR EAT, applying the dictum of Lord Nicholls in Nagarajan**.**

76. A wrongful dismissal claim can be presented before an Employment Tribunal if it arises or is outstanding on the termination of employment, article 3(c) Employment Tribunals Extension of Jurisdiction Order 1994. The test is, was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to terminate the contract summarily?, Enable Care and Home Support Ltd v Pearson UKEAT 0366/09.

Conclusion

Unfair dismissal

76. We asked the question, 'What was the reason for the claimant's dismissal?' The answer can be found in the letter of dismissal sent to the claimant dated 27 November 2019 by Mr Spinks. He concluded that the allegation of inappropriate and unacceptable behaviour and conduct towards a colleague relating to a disagreement in which the claimant made lewd gestures and offensive comments, had been proved. He also considered that the claimant's grievance that Ms Cullinane, referred to him as 'you fucking black bastard' was found not to have been proved nor corroborated.

76. Did the respondent follow a reasonable investigation? Four individuals were interviewed, Mr Murray submitted his own account of events. The claimant was

invited by Mr Gibson to give his account but was reluctant to do so as he took the view that he should wait for a manager to attend. He did speak to Ms Allibhai after Mr Gibson had a discussion with her and did not disclose his account of events. Those whom witnessed the incident were interviewed.

77. Mr Pettit and Mr Burdock were seized of the investigation and met with the claimant on 11 October, who then gave his account of the events and for the first time asserted that Ms Cullinane had said 'Fucking black bastard', referring to him. Mr Pettit was the claimant's second line manager and was not present on 4 October 2019. Much has been made about his independence but in relation to the ACAS guidelines and in relation to the respondent's own procedure, independence, as interpreted by Ms Allibhai, meant that the person was not involved in any way with the incident being investigated. In that regard Mr Pettitt was independent of the matters on 4 October 2019, likewise Mr Burdock.

78. From the evidence in the possession of Mr Pettit and Mr Burdock, the report that Mr Pettit provided was to the effect that he recommended that the claimant should be the subject of disciplinary proceedings. Ms Cullinane's account was corroborated by the witnesses who gave their accounts to Mr Gibson, apart from Mr Murray. The claimant attended the first disciplinary hearing on 8 November and the second on 26 November and gave his account as far as he was able to. However, on the first occasion, 8 November, but Mr Spinks who conducted the disciplinary hearing in the company of Ms Allibhai, expressed his difficulty in understanding the claimant's sequence of events. We find that that meeting was adjourned, not for Mr Spinks or some other person to undertake further investigation to speak to a number of witnesses or the same witnesses who had given statements, but to give the claimant time to set out in writing his version of events on 4 October. He, however, did not do so.

79. The hearing was reconvened on 26 November and on that occasion Mr Spinks realising the importance of the assertion made by the claimant that Ms Cullinane had said 'Fucking black bastard', decided to investigate that matter. It is entirely up to a disciplinary manager whether he or she needs further information to assist them in arriving at a conclusion and that was precisely what Mr Spinks did. It was something that was to the claimant's advantage rather than to his disadvantage. Having spoken to Ms Cullinane about what the claimant had alleged, he was satisfied that she did not make the offensive comment attributed to her and there was no corroboration of it.

80. Having considered the information before him Mr Spinks was satisfied that the allegations were proved and that the claimant did behave in the way alleged. He had made comments to Ms Cullinane about her deafness; about her son; he had held his crutch twice in front of her; her called her a racist; he said to her 'I'm a nigger, you are racist and a women knows when a man cheats and a nigger knows when someone is racist'. Those words were not necessary and were unwanted.

81. Ms Cullinane has a daughter-in-law who is married to one of her sons. She has three mixed-race grandchildren. The statement made by the claimant to her was deeply offensive and she was upset, such was her emotional state that she left her desk and made her way out of the open plan office and was assisted in doing so by another work colleague, Ms Islam. They were approached by Mr Gibson and that led to a conversation in which she agreed to make a complaint.

82. Mr Spinks, was satisfied with the evidence from the witnesses as to the claimant's conduct and use of offensive language that morning. It is for an

employer to determine the seriousness of the conduct, Tayeh. The decision to dismiss came within the provisions cited early in the respondent's disciplinary policy and constituted gross misconduct. The claimant's behaviour amounted to racism or racial harassment and indecency with reference to his lewd behaviour.

83. Was dismissal within the range of reasonable responses? The claimant's conduct fell within the examples given of gross misconduct in the respondent's disciplinary policy. Mr Spinks took into account his clean disciplinary record, length of service, and the fact that he was a good worker. Mr Spinks told us he did not want to lose the claimant as he was a good worker. It was the seriousness of his behaviour that led to the conclusion that summarily dismissal should follow. The claimant appealed and wanted the matter to be dealt with on the papers, despite the fact that the respondent wanted to speak to him in person and asked him to reply by 16 December. There is no evidence before us that he did reply and the letter of 9 January was sent stating that the appeal was closed.

84. Applying Newbound, we do not conclude that dismissal was outside the range of reasonable responses. In coming to this conclusion, we do not put ourselves in place of the reasonable employer.

85. In relation to the grievance, we find that the claimant did not cooperate with the grievance managers who were going to explore his complaint that Ms Cullinane had said 'Fucking black bastard'. We find that they did investigate his complaint and concluded that there was no evidence in support of it.

86. Applying Burchell, the unfair dismissal claim is not well-founded and is dismissed.

Direct race discrimination

87. In relation to the direct race discrimination claim, applying Madarassy, the claimant said that he was not allowed to complain. Mr Gibson took a different view as he invited the claimant to set out his case on 4 October but he did not do so. When he did disclose the alleged racist comment made by Ms Cullinane, it was investigated. We have come to the conclusion that the respondent treated the complaint raised by the claimant in the same way as it treated Ms Cullinane's complaint. She made her complaint first and it was investigated before the claimant's later complaint on 11 October.

88. The other difference relied on by the claimant is that Ms Cullinane was not suspended whereas he was, but the circumstances were different. Here was a case in which Mr Gibson was observing Ms Cullinane in the company of Ms Islam who was very upset and in tears because of the claimant's behaviour towards her. In the claimant's case, he later, on 11 October, raised the allegation about 'Fucking black bastard' but before then the respondent had enquired into what happened on 4 October, obtained statements and decided that the matter should proceed to an investigation. The claimant was suspended. It was not a disciplinary act but a step taken to avoid him coming into contact with Ms Cullinane.

89. We have come to the conclusion that the circumstances between the two cases are materially different. There was little in the way of supporting evidence to suspend Ms Cullinane.

90. In relation to the claimant's dismissal, we apply the "real reason" for the treatment approach as set out in the judgment of Shamoon. His dismissal had nothing to do

with his Afro-Caribbean race but had everything to do with the way in which he behaved on 4 October towards Ms Cullinane. There was evidence in support of his behaviour. There was no evidence that Mr Spinks was in any way influenced by the claimant's race, consciously or subconsciously. The direct race discrimination claim is not well-founded and is dismissed.

Victimisation

91. With the victimisation claim, the protected act is the claimant's complaint about Ms Cullinane's alleged racist comment. From the list of issues as clarified by Employment Hyams, on 18 February 2021, the claimant relies on the dismissal as being significantly influenced by the protected act. Applying Nagarajan, on the balance of probabilities, we are satisfied and do conclude that the claimant's dismissal was not significantly influenced by his complaint but by the complaint and evidence in support of his treatment Ms Cullinane. There was no evidence that Mr Spinks was in any way influenced by the claimant's complaint. There was no causal connection between the protected act and his dismissal. This claim is also not well-founded and is dismissed.

Wrongful dismissal

92. The wrongful dismissal claim is on the basis that the claimant was not paid his notice pay. The question is whether he had engaged in conduct so serious that he repudiated his contract of employment entitling the respondent to terminate his employment without pay or pay in lieu of notice? Applying Enable Care, we have to make findings of fact relevant to that determination and we find that the claimant's behaviour on 4 October 2019, amounted to gross misconduct. It was an act of racial harassment and indecency. He wrongly accused Ms Cullinane of being a racist after she had complained about him. Based on Ms Cullinane's family circumstances, the accusation did have a serious, emotional impact on her. We, therefore, have come to the conclusion that the claimant's conduct was so serious that it amounted to a repudiation of his contract of employment with the respondent entitling it to terminate his employment summarily without pay or pay in lieu of notice. This claim has not been proved and is dismissed.

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Employment Judge Bedeau

Date: 23 June 2022

Sent to the parties on:

23 June 2022

For the Tribunal: