EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr Caleb Maycock

Sky In Home Services Limited

Heard at: **London South Employment Tribunal (via CVP)**

On: **30 May – 1 June 2022**
30 June (In Chambers)

Before: **EJ Webster**
Mr J Bendall
Mr D Newlyn

Appearances
For the Claimant: **Ms R Omar (Counsel)**
For the Respondent: **Ms M Martin (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not upheld.
2. The Claimant's claim for direct race discrimination is not upheld.

REASONS

The hearing

1. We were provided with a bundle of documents, a supplementary bundle and several additional documents. Representations were made to the Tribunal regarding additional documentation and reasons given at the time as to whether they would be allowed.

2. The claimant made an application to add to his claim on the morning of the first day. His application was to add an incident to his claim for direct race

discrimination, namely that the conduct of the appeal process was discriminatory. That application was refused and full reasons given at the time.

3. The Tribunal was provided with the following witness statements:

   (i) The Claimant
   (ii) Mr Arran Maxwell (for the claimant)
   (iii) Mr Nigel Brothers (solicitor for the claimant)
   (iv) Mr Peter Phillips (Team manager for Respondent, Investigator)
   (v) Mr Andrew Smith (Team manager for Respondent, disciplinary decision maker)
   (vi) Mr David Gard (Regional manager for Respondent, appeal decision maker)
   (vii) Mr Tim Swift (Team manager for Respondent, claimant's line manager)
   (viii) Mr Justin Obee (Regional manager for Respondent, managed Mr Swift)

4. Initially, the statement for Mr Maxwell was not served with the others for the purposes of this hearing. However it transpired that it had been sent to the Tribunal before the previous hearing which had been postponed at the last minute through no fault of the parties. The statement for Mr Maxwell was allowed though in the event Mr Maxwell did not give evidence despite the Tribunal being told that he would appear, he did not in fact appear as the claimant's solicitor was not able to get hold of him on the relevant day. As a result, less weight was added to the evidence given that there was no opportunity to test his evidence.

5. Once submissions had been made, Ms Omar applied for permission to send in a case regarding the timing of the submission of the ET1 to the Tribunal. This was allowed and the respondent was allowed the opportunity to respond. The submissions on this point are considered below.

6. What was not discussed or allowed, was for the claimant to send in additional documentation and a covering email regarding his efforts to submit the claim to the Tribunal. Additional documents were sent in on 20 June 2022 by email. They were not copied to the respondent. The respondent has had no opportunity to respond. The documents are clearly relevant to the time point that we had to decide. We have therefore had to consider whether to accept them as evidence.

7. The possibility that all or most of the claimant's claims are out of time has been well canvassed and was clear from the list of issues. The issue of what attempts the claimant made to issue his claim are reference in the Case Management Order. The claimant had ample opportunity to provide these documents during the hearing and ought to have disclosed them well before the hearing in accordance with the Case Management Orders for disclosure. That he, and those he instructed chose not to, is of regret. There has been no explanation whatsoever as to why they were not disclosed before.

8. We must balance the relative prejudice between the parties. We conclude that it is not in the interests of justice or the overriding objective for us to consider

these documents that have been submitted so late and after the conclusion of the evidence and submissions with no opportunity for the respondent to deal with this new evidence. There is no reason the information provided and the evidence attached could not have been given at the hearing.

9. Overall, the claimant's case was poorly prepared. This matter had originally been listed for a hearing in February 2021. The parties state that they were fully prepared for that hearing and ready to proceed. Yet during this hearing, the witness evidence from the claimant was scant with regard to the issues we had to decide. Further Ms Omar sought to cast aspersions on the lack of information about the comparators from the respondent – but she at no point established the relevance of the comparators chosen nor could she show that any information about the comparators had been requested in advance. Given that the claimant was legally represented at least from the date of the last case management hearing, it is not clear why so little preparation appeared to have been done. It also meant, with the repeated applications, that the hearing took longer than it ought to have done hence the Tribunal having to reserve its decision and have an additional day in chambers.

10. The issues were agreed at the outset of the hearing as set out below.

The Issues

Direct Race Discrimination

11. Was the Claimant subjected to the treatment complained of: specifically:
(i) Did Justin Obee bully the Claimant in team meetings?
(ii) Did Justin Obee call the Claimant "stupid" in a team meeting in 2018?
(iii) Was the Claimant being placed on a two week focus plan by Tim Swift less favourable treatment?
(iv) It is admitted that the Claimant was dismissed.

12. Who is the Claimant's actual or hypothetic comparator?
In the claimant's further and better particulars he identifies the following:

(i) Anyone employed by the Respondent as an engineer who had not complied with the Respondents health and safety policy as regards ladder safety and who was not dismissed by the Respondent on the first occasion that he was found to have breached that policy.

(ii) The "member of the public" who sent the email on the 15 June 2019 to Tahir Khan was formerly employed by the Respondent as an Engineer and whilst in that employment he had breached the Respondents health and safety policy as regards ladder safety and was not dismissed by the Respondent on the first occasion that he was found to have breached those policy.

13. Are the Claimant and his comparator's cases sufficiently similar?

14. Did the Respondent treat, or would they have treated, an actual or hypothetical comparator of a different race more favourably?

15. Is any difference in treatment on the basis of race?

16. If so, did the Respondent's actions form part of conduct extending over a period which continued after 1 1th August 2019?

17. If not, would it be just and equitable to extend time so as to consider it?

Unfair Dismissal

18. Was it reasonably practicable for the claim to be presented within three months from the ETD (excluding the period ACAS early conciliation)? If not, would it be reasonable to extend time so as to consider it?

19. What was the reason for the dismissal?

20. Did the Respondent genuinely believe that the Claimant was guilty of the alleged misconduct?

21. Did the Respondent have reasonable grounds to suspect that the Claimant was guilty of the misconduct?

21.1 Did the Respondent carry out a reasonable investigation before making a final decision about the Claimant's guilt, specifically;
21.2 Did the Respondent follow the company procedure in the Conduct Meeting?

22. Was the Respondent's decision to dismiss the Claimant for gross misconduct within the range of reasonable responses for an employer in all the circumstances?

23. If the Claimant is found to have been unfairly dismissed, to what extent, if any, should a reduction in award be made on account of the Claimant's contributory fault?

24. If the Claimant is found to have been unfairly dismissed, to what extent, if any, should a reduction in award be made on account of the fact that if a fair procedure had been followed, the Claimant would still have been dismissed?

Facts

25. The claimant was employed as an Engineer from 23 April 2010 to 5 July 2019. In very brief summary, he was dismissed by the respondent following an incident where an anonymous person sent in a photo of him working up a ladder without any safety precautions being taken. He alleges that in the lead up to this incident he was bullied in a discriminatory way by his regional manager (Justin Obee) and placed on a performance improvement plan by his line manager (Tim Swift) in such a way that was discriminatory.

26. The claimant identifies as being of West Indian ethnicity (black).

Policies and training

27. The claimant did not accept that he had received any training from the respondent on ladder training. He accepted that he had received training when originally employed by a different company (ABC) before his employment was transferred to the respondent.

28. We find that he received the training as outlined in the training record provided (page 75). This shows that many though not all the courses were face to face and provided by his manager. We believe the claimant may have placed more emphasis on the idea of a classroom type course which we accept he did not receive. However he was not new to the role and he was provided with the training in the training record and he also received on site audit checks (page 148-168 – two site visit audits) where any issues were dealt with by managers and training or commentary provided to ensure health and safety policies were being followed. The claimant passed both of those audits demonstrating that he knew of the obligations as at those dates. In addition the claimant has at no point denied that he knew he ought to have been taking various health and safety precautions during the incident.

29. The claimant also accepted that he knew what was in the Respondent's ladder safety policies and knew what safety precautions were meant to be taken when using the equipment he used on the relevant day.

30. We note that the respondent's disciplinary policy states the following:

(i) That an individual may be suspended "where there is a risk to the health and safety of Sky people or anyone else" (pg71)
(ii) Under the heading 'Gross misconduct', one example given is "Any action that puts your or anyone else's health and safety at risk" (pg74)

Bullying allegations

31. The claimant alleges that he was bullied by Justin Obee at various team meetings.

32. He states that the bullying occurred at meetings on more than one occasion. The bullying took the form of saying things such as 'you're in the wrong job mate and you are not supposed to complain' and that the claimant 'should look for another job'. He also states that Mr Obee said that he would 'write a CV for me'. Mr Obee denies saying such comments and only remembers one particular conversation with the claimant where he expressed surprise that the claimant was not taking full advantage of the employee Sky benefits.

33. Mr Maxwell's witness statement confirms that Mr Obee behaved in a negative way during meetings and spoke down to people. He says that he witnessed Mr

Obee calling the claimant stupid, called him an idiot and told him to shut up. He also says that he himself felt belittled by Mr Obee. Mr Maxwell did not attend the hearing so this evidence was not tested and we accordingly give it less weight. We note that it is contradicted by what Mr Maxwell told Mr Gard for the purposes of the appeal process (p241).

34. Mr Brothers gave evidence that he had tried contacting several people at the respondent but they had been reluctant to give evidence. He had one anonymous email which stated that they had not witnessed the incident where the claimant was called 'stupid' but had heard about it. He said that he was aware that other people experienced bad behaviour from Mr Obee but that he himself had not.

35. In contrast, other engineers interviewed for the investigation into the claimant's grievance said that Mr Obee had not treated them badly nor that they had witnessed any behaviour. We note however that TT stated that the claimant had mentioned feeling bullied but had not witnessed anything. CM said that Justin spoke down to the claimant a little bit in one meeting. We take into account Mr Brother's evidence that people were too scared to speak out against Mr Obee because they feared for their job. However we have no evidence of how many people he spoke to about this or when he spoke to them. In principle we accept that people might be unwilling to speak out against their current line manager.

36. No information was provided to us regarding the race of those Mr Obee was said to have been rude to. We understood from Mr Swift that Mr Maxwell was white.

37. On balance we conclude that whilst Mr Obee may have at times been, as was put to him by Ms Omar, a bit abrasive in his manner – we had no evidence to suggest that this was targeted towards the claimant specifically nor that it could constitute bullying – though there is no definition of 'bullying'. Mr Maxwell's witness statement suggests that this was just Mr Obee's manner generally because he himself had been 'belittled'. That could also tie in with the current engineers not wanting to speak out. Whilst we don't seek to condone 'abrasive' behaviour, if the evidence of the claimant is to be taken at its highest, it shows that Mr Obee was like this to people regardless of their ethnicity or race.

38. In any event, whilst we have taken account of the evidence to the contrary, we generally prefer Mr Obee's evidence over the claimant's that Mr Obee had relatively little to do with the claimant. He was not the claimant's line manager. He attended meetings with the claimant but infrequently and his interactions with the claimant would not have formed part of a consistent campaign of negative behaviour. We therefore find, on balance, that Mr Obee did not say the precise words alleged by the claimant that he says amounted to bullying including the allegation that he called the claimant 'stupid'. Overall we had concerns regarding the claimant's reliability as we set out more below and in a context of having relatively little to do with the claimant, we find it unlikely that Mr Obee would have targeted the claimant in the way that he suggests.

39. Further, we had no evidence to suggest that any of Mr Obee's interactions with the claimant were different to those he had with any of the claimant's colleagues, including those who were white. All evidence that suggested Mr Obee could be rude or abrasive on occasion, confirmed that such treatment was given to everyone regardless of race.

The ACE performance plan

40. It is accepted that the claimant was placed on a performance improvement plan in February 2019 because his sales were not high enough. At the time of the claimant's employment, engineers in his role were tasked with selling products to the customers by explaining the various packages available to them.

41. Mr Swift states that he placed the claimant on the PIP because he was underselling. The purpose of the plan was to help him increase his sales. The plan lasted two weeks. The plan consisted of the claimant shadowing someone who had a high level of sales and speaking to Mr Swift every day to report back on his sales.

42. We were taken to a table (p284) of the region's lowest sales people. The trigger for being placed on a PIP was if your sales were below 5% over the past 8 weeks. This was not a manager's decision, it was triggered by the level of your sales and the sales figures were sent to the managers on a weekly basis. As a result of the claimant's sales levels it triggered him being placed on the ACE plan. We accept that this was not a decision taken by Mr Swift against the claimant. Mr Swift enacted the respondent's policy on underselling because of the claimant's numbers.

43. The claimant's representative appeared to misunderstand the table at page 284 in that she appeared to suggest that this showed he was not the worst performer. It is clear that he was not, but this table was the table of the region's poorest performers who triggered the below 5% PIP process. All of these people would have been placed on the ACE performance plan. It was not a table of the claimant's entire region – it was a table of the poorest performers in the region. It was therefore not inappropriate for the claimant to placed on the plan.

44. The claimant alleged that he remained on the ACE performance plan from February until his dismissal. Or, in the alternative it appeared that perhaps he was just suggesting that he did not know that he had been taken off the plan We disagree. We accept Mr Swift's evidence that the claimant quickly increased his sales and was removed from the plan after 2 weeks. He said that by the time of the claimant's dismissal he was one of the top performers in terms of sales. We see no reason or evidence that the claimant was kept on the plan and can see no reason as to why Mr Swift would keep him on the plan or not tell him that he had completed the plan in the face of improved performance.

45. The claimant stated that as a result of being on the ACE performance plan he would not be awarded over time. We saw no evidence of that. Most of the payslips that we saw demonstrated that he continued to get overtime during

this period and there was nothing suggesting that it was withheld. There was a time lag between performing the overtime and earning the commission making it not exactly possible to determine when overtime had been worked when it was paid.

46. Even if there was a policy which stated that overtime could not be worked, we find that this was limited to when the plan was in place. The payslips clearly identify overtime being worked at various times over the period between February and July 2019 thus undermining the assertion that he was on the plan for the entire period or undermining the assertion that he could not work overtime whilst on the plan – or, as we conclude, it undermines both assertions. The claimant's evidence in this regard was not plausible.

Doing private work for Mr Swift's friends

47. It was alleged that the claimant was asked on several occasions, to do work for Mr Swift's friends in the area. The suggestion was that this was unauthorised work, that Mr Swift was asking the claimant to do him and his friends a favour and that this placed the claimant under considerable stress as a result. It was also suggested that the possibility that the claimant could reveal these unauthorised practices to the respondent, was a factor in the claimant's dismissal.

48. The evidence to support the claimant's assertions was in the form of WhatsApp messages which clearly show Mr Swift asking the claimant to go and help a friend of his. The claimant says that there were many other such messages on the Respondent's internal communication system but he did not have access to it.

49. We accept and Mr Swift accepted, that the claimant was asked to do such work. Mr Swift explained that there was a system in place called 'Seg30' which meant that where a job was less than 30 days old it could be 'booked in' without going through the system. He accepts that he did put through the jobs for his friends who were also Sky customers in this way. However he does not accept that the claimant was put under any undue pressure to do that work – it was part of his day's work and he asked other engineers to do similar work. He had many friends in the area and this work was legitimate and known about by the respondent. The existence of such a scheme was endorsed by the other respondent witnesses.

50. We found the mechanics of the scheme confusing and vague. It seemed like an odd system to the Tribunal that new jobs would get priority over older jobs. Nevertheless, relevant to our considerations were whether Mr Swift was in some way putting the claimant under undue amounts of stress that caused him to behave in the way that he did on 15 June 2019 and whether the claimant's knowledge of this work contributed towards his dismissal.

51. Firstly we consider that whilst the claimant may have been stressed, we heard no evidence to suggest that it was this work which caused that stress or that this work formed such a part of the claimant's workload that it was reasonable for it to cause him stress. In addition we consider that the respondent took the

claimant's health into account when making its decision regarding the incident of 15 June. Further we were provided with no evidence at all that the existence of this work or the claimant's knowledge of Mr Swift's allocation of this work, in any way influenced the respondent's decision to dismiss the claimant. We explore that further below.

The Incident

52. It is agreed that on 15 June 2019 the claimant was carrying out a repair in Great Knollys Street in Reading. It is also agreed that at some point during that job, the claimant climbed up a ladder having not taken any safety precautions whatsoever. Such precautions ought to have included wearing appropriate PPE and attaching the ladder according to the Respondent's ladder use policies. We were taken to those policies.

53. The claimant states that he was only up the ladder for a short period. He had done the majority of the work for the customer following safety procedures and wearing appropriate PPE – but then, having packed away all his equipment, it became clear that the customer's picture was not working as it should have been and the claimant needed to swap the outputs over. He states that, for this very small part of the job only, he put the ladder back up without wearing any PPE and without following the safe ladder working polices. He said he was up the ladder for a very short period of time at this point.

54. A member of the public took photos of the claimant and sent them to the respondent. The claimant became fixated on who took the photos. He considered that they had been taken by a previous member of the team and wanted to know who had sent them. This is not an issue for us to decide, nor do we consider that it is remotely relevant to the decision we have to make. We note it however because it formed a huge part of the correspondence and conversations that the claimant then had with the respondent. We do not understand what relevance the identity of the person taking the photos has on the situation. The claimant has not told us what the significance is. If, as appears to be accepted, it was an ex-colleague, that does not change what the photos show.

55. The photos were taken from different angles and from different sides of a busy traffic light controlled junction. They show that he was up the ladder and reaching into two different boxes. The claimant appeared to suggest that one of the photos did not show him reaching into the top box. We disagree, this was clearly what the photo shows. That he seeks to assert that it does not show this when it plainly does, undermines his credibility as a witness.

56. The respondent witnesses suggested that the fact that he was reaching into that box show that he was not just swapping over the feed, but that he was also doing other work indicating that he had been up there for longer than the 1 minute he asserted and was carrying out more of the job without following safety precautions than he admitted to.

57. The pictures also show him on a busy road and if he fell, either he or the ladder could have gone into the road. They also show that he was just above some spiked railings and in one photo the customer was watching him work.

The investigation

58. The claimant attended a meeting on 17 June 2019 with Peter Phillips. The claimant says that he was only shown one photo. Mr Phillips says that he was shown more than one and saw all the photos that are at pages 170-176.

59. The claimant says that he did not see all the photos until 26 July 2019 when Mr Phillips sent him the photos over telegram which was a messaging service within the respondent. He also relies on the fact that he says he told them this at the disciplinary meeting on 6 August.

60. There were two phone calls between the claimant and Mr Phillips on 26th and 27th July. Mr Phillips says that they were calls to obtain more information from the claimant various matters. The claimant says that the 26th was the first time he saw the photos.

61. The notes of the meeting on 17 June reference both a photo and photos being shown to the claimant. The claimant says that he did not sign the notes and they are inaccurate. He says that the signature at page 183 is not his. The respondent stated that it was. He had signed the notes on an ipad or similar because the meeting was held off sight. They suggest that this accounts for the difference between this signature and other examples of the claimant's signature.

62. We accept the respondent's explanation for the difference in signatures. The signature at page 183 has the hallmarks of a digital signature such as a gap between parts of a line and the claimant accepts that the meeting was off site. This is a plausible explanation. Given that these notes refer to both a photo and photos, we do not think that the signature would have been doctored just for this reason.

63. Given that all the photos were sent to the respondent at the same time (the cover email refers to photos throughout, page 169) we think it very unlikely that Mr Phillips would choose to only show one photo to the claimant for the purposes of his investigation.

64. In any event, we do not consider that much turns on this point. On either version of when the claimant was shown the photos, he was shown them and was given an opportunity to comment on them before the decision to proceed to a disciplinary hearing was taken. Further, the claimant has not told us what he would have done differently or what disadvantage he was placed at only seeing one photo on 17 June and the rest on 26 July. They all capture the claimant up a ladder without any safety precautions being taken – something which he accepts occurred.

65. Mr Phillips also considered that the claimant had failed to complete an accurate risk assessment on the job and also proposed this as a grounds for disciplinary action.

The disciplinary hearing and outcome

66. The claimant was invited to the disciplinary hearing by letter dated 28 June 2019. That letter set out what he was being accused of and the possible repercussions including the possibility of dismissal. He was told of his right to be accompanied at the hearing. The hearing was scheduled for 5 July 2019. At the disciplinary hearing the claimant was accompanied by his workplace colleague Mr Witherall.

67. The claimant now says that he only got the appeal pack the night before. We do not accept that evidence. He has never raised that point before this hearing. He did not raise it at the disciplinary hearing even when asked 'You have received the pack'. Nor did he raise it as part of the appeal process. He also does not mention it in his witness statement.

68. On balance we accept Mr Swift's evidence that he delivered it by hand on the Monday or Tuesday as this seems plausible. That would have given the claimant the minimum 48 hours prescribed in the respondent's policy, to consider the information. The 'pack' was not large and other than the disciplinary report, it did not include a large amount of documentation and the claimant had seen most if not all of it before.

69. Andrew Smith chaired the meeting. During the meeting the claimant was given the opportunity to respond to the allegations.

70. He raised various points. Firstly he relayed that he had been under a huge amount of stress due to his partner's miscarriage. This had been understandably very traumatic. It had occurred three months earlier.

71. The claimant mentioned that he had to take sleeping pills because of the impact of the incident. That was considered by Mr Smith and he spoke to HR about it and reconvened the meeting to ask the claimant about the impact of the pills. The claimant confirmed that they had no physical impact on him at work and that he did not take them very regularly in any event.

72. The claimant said that on the day the customer was very difficult to deal with. The customer was unhappy because a previous engineer had not fixed the problem and so he was angry and put the claimant under a lot of pressure. The claimant said that against the background of his personal situation, this pressure was difficult to withstand.

73. The claimant also alleged that he had been required by Mr Swift to work for his friends on private jobs during his working hours. Mr Swift denied that and said that they had a system whereby you didn't have to book through the system if the outstanding job was less than 30 days old called 'Seg 30'. It wasn't particularly clear to us what this meant or how it worked, but given that successive respondent witnesses confirmed that this had been the system in

place at the relevant time, we consider that there was no wrong doing by Mr Swift in utilizing this system on behalf of his friends who lived in the area and, according to Mr Swift, were Sky customers.

74. Even if we are wrong in that, it is not clear how this could have influenced any decision to dismiss the claimant. Mr Swift was not part of the disciplinary process in any way other than to ask someone to take on the investigation and then to deliver the investigation pack. There is no evidence to substantiate that he had an impact on the process.

75. Mr Smith concluded that the claimant ought to be dismissed for gross misconduct on the basis that he had accepted he climbed a ladder whilst taking no safety precautions whatsoever. This amounted to gross misconduct under the respondent's policy. Mr Smith did not consider that the claimant's personal situation was sufficient mitigation against dismissal given that he had worked safely for 3 months since that incident, that his medication did not affect him and that the photos suggested the claimant was doing more than just going up the ladder for 60 seconds. He considered whether the claimant was under any particular pressure that day because of the customer but concluded that the claimant had experienced similar pressures before and this was not sufficient reason for him to ignore all health and safety measures. For all of those reasons Mr Smith decided to dismiss the claimant.

76. He did not uphold the allegation that the claimant had failed to complete a proper risk assessment.

77. In evidence before us he said that he had considered a lesser sanction and that he had taken into account the claimant's length of service – but felt that the wholesale nature of the claimant's failure to use any sort of safety measures even if it was just for a short period of time, could not be approved in any way and dismissal was the appropriate sanction.

78. The outcome was conveyed at the meeting and confirmed in writing. The claimant was given the right to appeal, which he did.

<u>The appeal</u>

79. The claimant appealed on two grounds. He said that there were procedural problems which are set out in (i) and (ii) below. The second ground was that he had additional information which was not discussed at the meeting but he wanted to be considered. That is encompassed by points (iii) – (v) below. Mr Gard summarises the grounds of appeal as he (and we) understood them in the appeal outcome letter (pg 242-244). The numbering is our own.

    (i) *"During our meeting you advised that Peter Phillips initially only showed you one picture during your meeting, but he contacted you a couple of weeks later as he wanted to discuss additional pictures with you. You have queried why you were not shown all of the pictures at your initial meeting with Peter.*

(ii) You also feel that there has been a data protection breach as the photographs from the member of the public were sent directly to a manager and not to Sky – you feel that another member of the team must have informed this person who the correct manager to send the photographs to was. You feel that you should have been told who sent the email with the pictures about you.

…

(iii) You have additional information which was not discussed at the meeting and want to be considered During our meeting you wanted it noted that you had completed private work on behalf of your manager Tim Swift. You stated that he had sent you around to his friends houses to complete work during your shift

…

(iv) Another point that you raised with me was that you felt that you had been bullied in work by Justin Obee. You said he has spoken to you "like crap" and always spoke to you horribly.

…

(v) A further point you raised was that you felt that you had been put under pressure by your manager as he had put you on a plan regarding your sales.

80. Before reaching his decision he interviewed Mr Obee, Mr Phillips, Mr Swift and 6 members of the claimant's team. Mr Gard did not interview Chirs Witherall as suggested by the claimant despite the claimant saying that he had witnessed some of the bullying behaviour alleged. It is not clear why. Further Mr Gard did not consider the information provided by the claimant regarding the possible addresses and names of people he did work for that he believed were Mr Swift's friends as opposed to proper customers. The claimant did give road names for the clients.

81. Points (iii) to (v) identified in paragraph 72 above, were raised by the claimant to suggest that these were reasons for Mr Swift and Mr Obee to want to dismiss the claimant. The respondent's evidence was firstly, that these allegations were investigated and not found to have occurred, secondly that Mr Swift and Mr Obee had not been part of the disciplinary process and thirdly that the clear reason for dismissal, even if these issues had been occurring, was the claimant's failure to follow any health and safety processes when he was photographed; something the claimant did not deny.

82. We accept that Mr Swift and Mr Obee played no part in the claimant's dismissal. There is no evidence of them doing anything other than asking people within the organization to take on the investigation and disciplinary meetings. When the claimant stated that he did not want Mr Obee as the decision maker for the appeal – that was allowed and Mr Gard was appointed. The claimant objected to Mr Obee because he had apparently been rude about the claimant to the team during the claimant's suspension. We do not make a finding in regard to this incident as it was not an allegation relied upon as a discriminatory act. When the respondent was informed of the claimant's

misgivings about Mr Obee's impartiality, his request for a different manager was agreed to.

83. We accept that it would have been better for Mr Gard to have looked in more detail at the Seg30 work and checked the addresses given to him by the claimant regarding Mr Swift's friends. However we do not consider that such a failure renders the process unfair given that we do not believe that Mr Swift, or the fact that the claimant raised this issue, influenced the decision to dismiss him or the decision not to uphold his appeal. This was peripheral to the situation of a breach of health and safety policies.

84. We also recognise that Mr Gard failed to interview Mr Witherall as suggested by the claimant. Nevertheless, even if Mr Witherall had been interviewed and had supported the claimant's allegations of bad treatment by Mr Obee – the claimant has not explained how this would have changed a decision regarding the incident on 15 June. We accept it could, if proven to us, potentially show that the respondent's decision was not reasonable because either it did not take into account the potential pressure that this could place the claimant under, or could suggest that the respondent orchestrated the claimant's dismissal because Mr Obee did not like him. We do not accept that either of those possibilities is supported by the evidence. The claimant did not raise Mr Obee's behaviour towards him during the investigation or disciplinary meetings. He had never raised a grievance about it previously. He maintained throughout the process and before us that any pressure he had felt he was under had not impacted the claimant in the three months prior to this incident or at any time before. We also accept that Mr Obee played no part in the decision to dismiss the claimant so any personal animosity towards him did not inform Mr Phillips' investigation, Mr Smith's decision or Mr Gard's decision. We therefore consider that any proven negative treatment or bullying by Mr Obee would have been, at best, a peripheral issue to the dismissal.

85. We consider that the same assessment applies to the failure to investigate the addresses to which Mr Swift sent the claimant to carry out jobs for his friends. At no point has the claimant demonstrated to us how the issue of whether he did work for Mr Swift's friends 'off the books', affected the incident on the day or the decision to dismiss him. If, (as is suggested by his solicitor in the letter dated 30 September 2019), it would be a motive for Mr Swift to dismiss the claimant – we again come back to our finding that Mr Swift played no part in the decision to dismiss the claimant. Other than this assertion in the solicitors letter, there is no evidence to suggest that this situation played any part in the claimant's dismissal.

86. Mr Gard did not uphold the claimant's appeal. He stated that he did not consider any of the points raised by the claimant at points (i) to (v) above were reasons that meant that the decision to dismiss him was undermined. He found that none of the claimant's assertions was correct.

<u>The comparators</u>

87. The evidence we had regarding the evidence was confused and confusing. The respondent provided a table detailing the information regarding the comparators. This was, as set out in the claimant's further and better particulars, anyone employed by the Respondent as an engineer who had not complied with the Respondent's health and safety policy as regards ladder safety and who was not dismissed by the Respondent on the first occasion that he was found to have breached that policy.

88. The claimant only referred to one of the comparators in his witness statement. The respondent witnesses did not include evidence about the comparators in their statements either. Ms Martin simply dealt with the matter in submissions by saying that she did not consider any of them appropriate comparators and urging us to consider the table at pg313 which instead showed Mr Smith's decision making record and demonstrated the consistency in his decision making both regarding offence and regardless of race.

89. In the claimant's witness statement he stated that AB, who was also the person he said had photographed him had not been dismissed in the same circumstances. The respondent stated that he had resigned during the disciplinary process and therefore was not an appropriate comparator.

90. There was no other evidence given to us regarding the comparators.

The Law

Unfair Dismissal

91. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –

(a) The reason (or if more than one, the principal reason) for the dismissal, and

(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

….

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss 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 employer's undertaking) the employer acted reasonable 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.

92. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98(2)(b) Employment Rights Act 1996 ('ERA'). In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) ERA is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

93. The test as to whether the employer acted reasonably in section 98(4)ERA 1996 is an objective one. We must decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). We have reminded ourselves of the fact that we must not substitute our view for that of the employer (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82*);

94. We have reminded ourselves that this test and the requirement that we not substitute our own view applies to the investigation into any misconduct as well as the decision. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. This means that we must decide not whether we would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. We know that we must assess the reasonableness of the employer not the potential injustice to the claimant Chubb Fire Security Ltd v Harper [1983] IRLR 311). and only consider facts known to the employer at the time of the investigation and then the decision to dismiss (W Devis and Sons Ltd v Atkins [1977] IRLR 31.)

95. S136 Equality Act 2010 - The Burden of Proof
S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

96. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

97. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

98. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

99. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

Direct discrimination – s 13 Equality Act 2010

100. s 13 EqA "(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."

101. We have reminded ourselves that discrimination such as this is rarely obvious and it is unusual that any such treatment is openly admitted to or confirmed by clear written evidence as confirmation. The tribunal must consider the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

102. For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and any comparator. (*section 23(1), EqA 2010*).

Limitation

103. S 111 ERA 1996

(1) A complaint may be presented to an [employment tribunal] against an employer by any person that he was unfairly dismissed by the employer.

(2) [Subject to the following provisions of this section]2 , an [employment tribunal]1 shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

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

(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)

104. 207B ERA 1996 Extension of time limits to facilitate conciliation before institution of proceedings

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").[...]2

(2) In this section—
(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

105. S 123 Equality Act 2010 Time limits

(1) [Subject to [section 140B]2 proceedings]1 on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Conclusions and Discussion

Limitation

106. Dealing first with the tribunal's jurisdiction to hear the claimant's claims. S111 ERA 1996, as set out above, states that a claim for unfair dismissal must be brought within 3 months of the date of dismissal subject to the Early Conciliation legislation.

107. The claimant was dismissed and his contract terminated on 5 July 2019. He contacted ACAS within 3 months on 3 October 2019. The certificate was issued on 3 November 2019. The claim form was received by the Tribunal on 11 December 2019.

108. The claimant's claim for unfair dismissal ought to have been received by the Tribunal on or before 3 December 2019 which is one month from the date of the issue of the ACAS Certificate.

109. The only information we had at the date of the hearing regarding the claimant's attempts to submit the ET1 to the Tribunal was as recorded by EJ Cheetham which is as follows:

> . This is a claim by the Claimant, Mr Caleb Maycock, that alleges unfair dismissal and race discrimination. The ET1 was filed on 11 December 2019 and there is an issue as to whether it was filed in time, because the date of the ACAS Early Conciliation Certificate was 3 November 2019, which suggests that the ET1 should have been filed with the Tribunal by 3 December 2019.
>
> . Dealing with this issue first, I was told that the Claimant had tried to issue the claim in the Reading Tribunal, but was unable to do so and had to post it, which is why it arrived late. That is therefore an issue that can be determined at the final hearing and the Tribunal can decide at the time whether to deal with it as a preliminary issue.

110. In her submissions, Ms Omar told us that the claimant did not receive the ACAS certificate until 4 November. She says he then went to the Reading Employment Tribunal in person to try to issue the ET1 (though she did not give a date we presume that this was on 4 December). At Reading Tribunal he was told that he could not issue his claim there and was apparently told to do it online. He emailed it to the tribunal (again the date was somewhat vague but we assume it was on 4 December) but it was rejected and he got a letter from the Tribunal service dated 5 December saying that it could not be submitted by email so the claimant posted it.

111. We understand that at this time the claimant was a litigant in person. However it appears that he understood that there was a deadline, he knew he had to comply with it, and he still left it until 1 day after the deadline to attempt to issue the ET1. Despite knowing that the ET1 deadline had passed (even on

the submissions which suggest he thought it was 4 December) and the ET1 had not been accepted via email, the claimant does not appear to have attempted to use the online form at any stage. Certainly we had no evidence to that effect. This is despite having had information on the process presumably from both the Reading Tribunal and when he received the rejection of the email copy. There has been no explanation as to why he did not attempt to use that method and instead chose to post it. The claimant is an engineer working with presumably advanced technology and we have heard no evidence to suggest that he was somehow unable to use the online form or unaware of its existence (which seems unlikely given his contact with the tribunal system which is likely to have informed him of the relevant process).

112. In any event, he mistakenly thought that the deadline was 4 December instead of 3 December. We have had no evidence to suggest that this was a reasonable error on his part in all the circumstances. We have no evidence that he only received his ACAS certificate on 4 November, nor that it was reasonable for him to think that this meant the deadline was 4 December.

113. We therefore conlcude that it was reasonably practicable for the claimant to submit his claim in time. He knew that there was a deadline. He made a mistake on the date but that is not sufficient in our view to establish that it was not reasonably practicable for him to have submitted it in time. There has been no evidence as to why he waited until the last minute or why he got the date wrong other than that Ms Omar told us that he received the ACAS certificate on 4 November. Yet we had no evidence of that nor any evidence of what the claimant thought the deadline was. We have not been given any evidence to satisfy us that it was not reasonably practicable for him to submit his claim in time.

114. Even if we are wrong in that, he did not then submit it within such further period as we consider reasonable as he chose to post it rather than use the online form as he had been instructed to do. It also appears that he posted the form several days later as it did not reach the Tribunal until 11 December some 8 days after the deadline and 6 days after he knew his email copy had not been accepted.

115. For those reasons we do not consider that the Tribunal has jurisdiction to consider the claimant's claim for unfair dismissal and the claim fails.

116. Turning to the claimant's claim for discrimination. The test to be applied under s123 EqA 2010 is whether it would be just and equitable for us to extend time.

117. The claimant relies on four separate acts of discrimination:

(i) The bullying behaviour by Mr Obee (no specific dates given)
(ii) Mr Obee calling him stupid in a meeting in 2018
(iii) Mr Swift placing him on the ACE improvement plan (February 2019)
(iv) The decision to dismiss him

118. We accept Ms Omar's submissions that a lack of evidence regarding the reason behind any delay in submitting a claim is not fatal to us considering whether it is just and equitable to extend time. She relied on the case of Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 ('Morgan').

119. The respondent also accepted that premise in its submissions. However it reminded us of the case of Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA and the guidance given there:

> *When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*

120. We have taken each act relied upon in turn when assessing whether it would be just and equitable for us to exercise our discretion and allow the claims out of time. This is not a case where each matter could be said to run into the other or be part of a continuing act. Apart from the bullying behaviour by Mr Obee and the incident of calling the claimant 'stupid' they are clearly separate matters and incidents. This is particularly the case given that we have found that the decision to dismiss was not made by Mr Obee or Mr Swift against whom the other discrimination allegations have been made. We heard no evidence to suggest that this was a continuing act.

121. We accept the respondent's submissions that any incident before 11 August 2019 is out of time and we must therefore consider it is just and equitable for us to extend time in relation to each and every act relied upon.

122. The bullying behaviour described did not have specific dates attached. Taken at its highest we presume that such behaviour could have continued until the claimant's suspension which was on 17 June 2019. It cannot have occurred after that as the claimant did not return to work. There was no evidence to suggest that Mr Obee was bullying the claimant whilst he was at home or had any significant interaction with him after his suspension.

123. The claimant has not explained why he did not raise his concerns regarding any such behaviour until his appeal or suggest that he was trying to resolve the situation through internal means. The claimant has not explained why we should exercise our discretion to extend time save for stating that he was a litigant in person and the problems he had with issuing his claim already discussed above. He has not told us, for example, that he did not understand

tribunal deadlines or not know that he had a potential claim or was too unwell to engage with the situation properly or that he was waiting for the outcome of an internal process. Whilst not providing evidence regarding a delay is not fatal, we still do not know from the evidence we have received about the whole claim, why the claimant waited several months to raise this issue. In the case of Morgan relied upon by Ms Omar, the Tribunal was able to understand why there was a delay. We have simply not been given any evidence on which we could conclude what the possible reason would be which would allow us to exercise our discretion.

124. We accept that failing to exercise our discretion would deny the claimant the opportunity to pursue his claim. The respondent has already demonstrated that it is in a position to defend the allegations. However on balance, we do not accept that it is just and equitable to extend time to consider this part of the claimant's claim because we simply do not know and cannot guess at the reasons why a claim or a complaint of any kind was not raised before.

125. We apply the same reasoning in respect of the one off comment of Mr Obee calling the claimant stupid. This was a one off comment in 2018 that according to the claimant happened long before his dismissal and long before he raised a claim. There were no ongoing grievances or issues with the respondent at this time. There was no ill health on the part of the claimant at this time. Even accepting that the claimant was very shocked and upset regarding his partner's miscarriage, the alleged act of discrimination arose long before that incident.

126. We do not accept that it is just and equitable to extend time in relation to the decision to place the claimant on the ACE improvement plan. This was a one off act to impose a plan that was only in place for 2 weeks in February 2019. Whilst the claimant raised concerns about this in the appeal it was in the context of allegations about Mr Swift asking him to work for his friends. As stated above absolutely no explanation has been given as to why this was not raised as a concern by the claimant earlier. We suggest that this is because the plan was only in place for 2 weeks, the claimant responded well, improved his performance and was removed from the plan and did not think anything of it until later. We do not consider that it would be just and equitable to extend time to consider this claim. Again we have no evidence to explain the delay. We understand the case of Morgan indicating that we don't have to have direct evidence on the point – but we cannot piece together from the evidence we do have, why there was a delay.

127. We come finally to the claimant's dismissal. This claim was submitted 8 days late. The claimant has explained, to an extent, the reasons for the delay being technical. The delay is short and the impact on the respondent is minimal. We therefore consider that it would be just and equitable to extend time given the shortness of the delay, the fact that the claimant was trying to raise a claim, and the relative prejudice to the parties means that the respondent is not prejudiced by the late submission. We therefore exercise our discretion and allow the dismissal part of the discrimination claim in.

Unfair Dismissal – Employment Rights Act 1996

128. Although our first finding is that this claim is out of time. We nevertheless set out our findings in relation to that claim in case we are wrong on the time point.

129. We conclude that the claimant was dismissed because of his conduct. The claimant was photographed up a ladder having followed no safety precautions whatsoever. The claimant accepted that he was in breach of the claimant's health and safety policies and knew that he was at the relevant time. This behaviour was cited in the respondent's disciplinary policy as a possible act of gross misconduct. We do not accept the claimant's apparent submissions that he was in fact dismissed because he had been asked by Mr Swift to do work for Mr Swift's friends or because Mr Obee did not like the claimant or because Mr Swift had placed the claimant on a performance plan.

130. In investigating the situation we find that the respondent carried out a reasonable investigation in that they showed the claimant the photos and interviewed the claimant who immediately accepted the behaviour he was alleged to have committed. The timing of when he saw the photos is largely irrelevant as he accepts he saw them and had a chance to comment on them as part of the investigation and before the matter was referred as a disciplinary matter.

131. The respondent followed a reasonable procedure. The claimant knew of the allegations against him, he was given an opportunity to respond to them and any evidence against him both during the investigation and the disciplinary meeting. He was entitled to be accompanied at the disciplinary meeting and the appeal hearing. We do not accept that he was not given the materials sufficiently far in advance of the disciplinary hearing. He was provided with them on the Monday or Tuesday and the hearing was on the Friday. The claimant was given the right to appeal and an appeal was considered by someone independent of the original decision maker.

132. The Tribunal does not accept that Mr Obee or Mr Swift chose who conducted the hearings nor that they had a hand in making the decisions. There was simply no evidence whatsoever to suggest that. The people making the dismissal decision and the appeal decision were independent and not 'tainted' or influenced by the allegations the claimant has made against Mr Swift or Mr Obee.

133. Based on the information that he had before him, including, importantly, the photos and the claimant's acceptance that he had worked without taking any safety precautions whatsoever, we consider that Mr Smith's decision to dismiss the claimant fell within the range of reasonable responses for an employer in all the circumstances. He took into account the mitigation that the claimant raised at the time and weighed this against the situation. He considered a lesser penalty but decided it was not appropriate in circumstances where there had been such a wholesale disregard for the claimant's own health and safety and that of the customers and the public.

134. During the appeal the claimant raised further issues that he feared had impacted on the decision to dismiss him. We consider that Mr Gard investigated those matters reasonably by interviewing the relevant members of staff. It is correct to say that he did not interview one witness as suggested by the claimant and he did not check the addresses which the claimant had provided regarding the work carried out for Mr Swift's friends. However, we accept that these were peripheral issues at best to the reason behind the claimant's dismissal. There for the failure to do those things does not render the investigation into the appeals unreasonable.

135. Mr Gard reasonably concluded that despite the points raised by the claimant, the only reason for the claimant's dismissal had been the misconduct – no other matters impacted on Mr Phillips' investigation or Mr Smith's decision to dismiss. Therefore the appeal investigation was reasonable and Mr Gard's decision to uphold the decision to dismiss the claimant was also reasonable.

Race Discrimination

136. As set out above, the only part of the claimant's race discrimination claim that we have extended time for and therefore have jurisdiction to consider is his dismissal. Nevertheless, in case we are wrong in those decisions, we set out our findings with regard to all aspects of the claimant's race discrimination claim.

137. In the first instance we have found, on balance, that we do not accept that Mr Obee bullied the claimant in the way described either generally or in calling the claimant 'stupid' in 2018. We have preferred the respondent witnesses' evidence in respect of whether Mr Obee said the things suggested. We also do not accept that the claimant has shown that he was treated differently from his white colleagues. Even if he has established that Mr Obee could be rude on occasion, his own witness, Mr Maxwell, stated that Mr Obee was also rude to him and he is white.

138. For those reasons we do not accept that the claimant has provided a set of facts from which we could infer that discrimination may have occurred and the claimant has not shifted the burden of proof.

139. With regard to placing the claimant on the performance plan. We accept that the reason the claimant was placed on the plan was his sales figures. They were the sole trigger. It was not a decision taken by Mr Swift or Mr Obee; it was a policy in place at the respondent that if sales dipped below 5% in the previous 8 week period then the ACE performance plan would be initiated. The respondent has clearly shown that the decision had nothing to do with race. We therefore consider that the claimant has failed to establish a set of facts from which we could infer discrimination. The claimant has therefore failed to shift the burden of proof. Even if the claimant had – there is a clear non discriminatory reason that the claimant was placed on the plan – namely his sales figures.

140. Finally we come to the claimants' dismissal. As we have discussed

above, the information the claimant gave to us about his comparators was extremely limited. Looking at the information we have in the table provided by the respondent we consider that all of the comparators, apart from one, had committed less serious breaches of the health and safety policy than the claimant's wholesale breach and are therefore not individuals in the same circumstances. The one person who did find himself in a similar situation resigned (ED) – possibly so as not to be dismissed – but we do not have that information. However either way it is impossible to determine that he would have been treated more favourably than the claimant.

141. We have also had regard to the table describing Andrew Smith's decisions regarding health and safety breaches and dismissals as opposed to the parameters outlined by the claimant for his comparators. That information demonstrates that Mr Smith made decisions to dismiss people who were white who committed acts of gross misconduct, including someone in very similar circumstances to the claimant. That information also demonstrates that he gave lesser sanctions to people for lesser infractions including those who are described as black or mixed race. This suggests that race played no part in his decision making and that the seriousness of the health and safety breach was paramount in his decision making.

142. Based on this information we therefore conclude that the claimant has not shown that he was treated less favourably than his white colleagues in similar or broadly similar circumstances. In failing to show a difference in treatment we consider that the claimant has failed to shift the burden of proof.

143. If we are wrong in that we consider that the respondent has clearly demonstrated that the non-discriminatory reason for the claimant's dismissal was his wholesale failure to follow the health and safety requirements in his role on 15 June 2019 and they dismissed him in accordance with their strict health and safety standards.

144. For those reasons the claimant's claim for race discrimination is not upheld.

Employment Judge Webster

Date: 8 July 2022