EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. A. Majid	v	**RAK Ceramics U.K. Limited**

Heard at: **Birmingham (hybrid)** **On:** **2,3,4 and 5 August 2022**

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Before: **Employment Judge Wedderspoon**

Members : **Mr. E. Stanley**

Mrs. S. Bannister

Representation:

Claimant: **In Person**

Respondents: **Mr. C. Johnson, Consultant**

JUDGMENT

1. The unanimous decision of the Tribunal is that :-
   1.1 the claimant's complaint of unfair dismissal is well founded and succeeds.
   1.2 There is no finding of a Polkey deduction;
   1.3 The claimant did not cause or contribute to his dismissal;
   1.4 The claim for automatic unfair dismissal is not well founded and is dismissed
   1.5 The claim for direct race discrimination is not well founded and is dismissed.
   1.6 The claim for breach of contract is not well founded and is dismissed.
   1.7 The claim of holiday pay is not well founded and is dismissed.
   1.8 The claimant is awarded a basic award of £752.70.
   1.9 Compensatory award is assessed at £2,718.55.
   1.10 An uplift of 20% is £543.71
   1.11 The total award is calculated at £4014.96.

REASONS

1. By claim form dated 6 September 2020 the claimant brought complaints of unfair dismissal, automatic unfair dismissal; direct race discrimination, notice pay and arrears of pay. The matter came before Employment Judge Gaskell on 10 September 2021 who made various case management directions. He requested the claimant to consider whether he continued to pursue ordinary

unfair dismissal. The claimant was informed that it was likely he had less than 2 years' service even if the further one week paid in lieu was taken into account. Before the Tribunal the claimant continued to argue that had notice been added to his service he would have had the necessary two years required to bring the claim of unfair dismissal. The Tribunal determined to hear evidence and argument on this point. The claimant confirmed he was not pursuing a notice pay or holiday pay claim.

2. Following discussion with the parties it was agreed that the issues to be determined are as follows :-

Unfair dismissal

2.1 Does the claimant have the sufficient service to bring a claim of unfair dismissal ?

2.2 What was the reason or principal reason for dismissal ? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct;

2.3 If the reason was misconduct did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide in particular whether :

2.3.1 there was reasonable grounds for that belief;

2.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

2.3.3 the respondent otherwise acted in a procedurally fair manner;

2.3.4 dismissal was within the range of reasonable responses.

3.1 Automatic unfair dismissal section 103A of the Employment Rights Act 1996

Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1. What did the claimant say or write? When? To whom? The claimant says he made a disclosures on 30 April 2020 when he telephoned Ms. Jackson and complained that there was no social distancing at work, no PPE, no hand sanitiser; the manager was suggesting a conspiracy theory in respect of the COVID pandemic and was very aggressive and intimidating.

3.1.2 Did he disclose information?

3.1.3 Did he believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did he believe it tended to show that:

3.1.5.1 the health or safety of any individual had been, was being or was likely to be endangered.

3.1.6 Was that belief reasonable?

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

3.3 Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

If so, the claimant will be regarded as unfairly dismissed.

4. Remedy for unfair dismissal

4.1. The claimant does not wish to be reinstated or re-engaged by the respondent.
4.2 If there is compensatory award, how much should it be? The Tribunal will decide :
4.3 What financial losses has the dismissal caused the claimant?
4.4 Has the claimant taken reasonable steps to replace their lost earnings for example by looking for another job?
4.5 If not for what period of loss should the claimant be compensated?
4.6 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason?
4.7 If so should the claimant's compensation be reduced/ By how much?
4.8 Did the ACAS code of Practice on Disciplinary and Grievance Procedures apply?
4.9 Did the respondent or the claimant unreasonably fail to comply with it?
4.10 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion up to 25%
4.11 If the claimant was unfairly dismissed did he cause or contribute to the dismissal by blameworthy conduct?)
4.12 If so would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
4.13 Does the statutory cap of fifty two weeks pay or statutory maximum amount apply?
4.14 What basic award is payable to the claimant if any?
2.15 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so to what extent ?

5. Direct race discrimination (Equality Act 2010 section 13)

5.1 The claimant brings his race discrimination claim based on national origin. The claimant describes himself as British Pakistani
5.2 Did the respondent dismiss the claimant?

5.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. The claimant relies upon
(a)Terry Newman, Lyndon Asbury, Luke Flintoff (white British)
(b)Justin (Black)
(c)Marco Fellah (Arab/North African)

5.4 If so was it because of race ?

Remedy for discrimination

6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

1.1 What financial losses has the discrimination caused the claimant?

1.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

1.3 If not, for what period of loss should the claimant be compensated?

1.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

1.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

1.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

1.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.8 Did the respondent or the claimant unreasonably fail to comply with it ?

1.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

1.10 By what proportion, up to 25%?

1.11 Should interest be awarded? How much?

HEARING

7.The Tribunal was provided with an agreed bundle of 149 pages. At the commencement of the hearing the claimant's requested inclusion in the bundle of documents (a) a letter addressed to him dated 4 December 2010 from Heather Farnden and (b)the driver's handbook dated August 2017. The Tribunal agreed to this request in the circumstances that the respondent did not object to the inclusion of the documents and the Tribunal considered the documents and they appeared potentially relevant to the issues.The Tribunal heard from the claimant. He also relied upon the written representations of Lyndon Asbury and Lee Burton. The Tribunal heard from the respondent's witnesses, Ben Louther, Manager; Andrew McAllister, Head of Finance and Heather Farnden, General Manager. The respondent also relied upon the written representation from Jennifer Jackson, H.R.

Officer. Both parties were informed that the evidential weight to be attached to written representations was minimal because the witnesses had not attended the Tribunal and their evidence had not been challenged.

8. The case was timetabled. The parties were made aware that it was important that their respective cases were challenged and the Tribunal drafted up a list of issues and provided copies to the parties and requested that any questions be focused on the list of issues The respondent suggested only a minor amendment to the list of issues. Further it requested an inclusion of the issue of contributory fault. Although this had not been formally pleaded in its ET3 the Tribunal determined that as part of its decision making and in its discretion it should consider this issue when considering all the evidence.

9. At 4.10 p.m. on the first day following the conclusion of the claimant's evidence, the respondent applied for a witness order for Ms. Jackson. The respondent had provided a witness statement from her by way of written representation but she was unwilling to attend and the respondent had not been able to contact her recently. The respondent wished for her to attend the Tribunal on the second day of the hearing because her written statement was at odds with the claimant's witness evidence to the tribunal and she was relevant to the issues. When asked why the application had not made before the first day of the hearing, the respondent stated that it had not considered her evidence would be so contentious. The Tribunal were not satisfied that the respondent could not have appreciated that her evidence contradicted the claimant's case. His case contained in his appeal letter made clear he alleged he had raised health and safety concerns to her in April 2020 and complained about the lack of PPE and COVID safety measures. The respondent had sufficient time to make the application long before the afternoon of the first day of the hearing. The respondent was also unaware as to the whereabouts of Ms. Jackson and whether indeed she was actually in the country. The Tribunal concluded that serving a witness order for her to attend tomorrow or this week was impractical and unrealistic. Granting the application at this late stage could mean that if the witness could not be served or could not attend this week, the listing of the hearing this week would be affected; that was unfair to the claimant who's reasonable expectation was that his case would be heard and concluded this week when listed as far back as September 2021. The Tribunal concluded that since the application was made so late in the day; should have been made at an earlier stage; may be impractical in any event due to the uncertain whereabouts of the witness, it was not in the interests of justice to grant the witness order; granting the application had the risk of causing delay to the hearing of this case this week. The application for a witness order was refused.

10. On day 2 the respondent requested the inclusion of new documents pages 150 to 155. The new documents included some emails in March 2020 concerning steps taken in the COVID pandemic by the respondent and the claimant's pay slip dated 31 July 2018. The claimant had no objections to these documents being included in the bundle and the Tribunal considered they may be relevant to the issues. They were added to the bundle.

Credit

11. The Tribunal formed the view that the claimant in an effort to succeed in his claim embellished his case as to the commencement date of his employment. Otherwise, the Tribunal found on balance, the claimant to be a credible person and honest. Mr. McAllister was a credible witness who candidly accepted the claimant's dismissal was rushed through to avoid the a potential unfair dismissal claim. There was a discrepancy in the evidence between Mrs. Farnden and Miss. Jackson's written representation regarding how Mr. Louther was made aware of the claimant's health and safety concerns. Mrs. Farnden in answer to the Tribunal's questions stated she had not spoken to Mr. Louther; she had a conversation with Ms. Jackson on a video call. However, Ms. Jackson's evidence indicated Mr. Louther was actually on the video call along with Alvin Biggs, the Managing Director and Mrs. Farnden. Both Mr. McAllister and Mrs. Farnden did at times fail to take ownership for their decisions to the extent that they both contended they relied on advice from others, in particular the H.R. Officer.

12. The claimant had suggested he had been set up by Mr. Louther and employee 3 who was a friend of Mr. Louther; they had attended a music festival together. In the course of cross examination, it was revealed by the claimant that Mr. Louther was a director of a company for a period of four months in 2021 of a business concerned with sanitaryware, a potential customer of the respondent. Mr. Louther told the Tribunal that he assisted a friend to set up a business but was unaware he was a director. Once he became so aware, he asked to be removed as a director. The Tribunal considered that the fact that Mr. Louther was a director of this business did not support the claimant's allegations he had set up the claimant but it demonstrated questionable judgment on the part of Mr. Louther in assisting a friend in this way and acting potentially in conflict with his employer. Although employee 3 and Mr. Louther may have attended the same festival, the Tribunal did not conclude on this basis that there was collusion between employee 3 and Mr. Louther. Further the Tribunal found that despite Mr. Louther's protestations that he did not hold a grudge against the claimant for raising a health and safety issue to Ms. Jackson about him, the Tribunal found on the balance of probabilities by his actions of inviting the claimant to a meeting expressing his disappointment that the claimant had raised a health and safety concern to HR Mr. Louther did hold a grudge against the claimant. The claimant was following management instructions contained in a letter dated 4 December 2019 which informed employees to raise health and safety concerns to senior management. Further Mr. Louther informed the Tribunal that he was only asked to conduct the investigatory meeting and to make no findings of fact or recommend a disciplinary hearing. However, this appeared to the tribunal to be inconsistent with what he said to the claimant at the end of the investigation meeting on 11 June 2020 when *"I will consider it further and will be in touch. Could be a disciplinary or no further action. We will be in touch soon."* This left the claimant with the clear impression he was a decision maker. The Tribunal found that there was an evidential gap in the respondent's case as to who actually decided to proceed to a disciplinary hearing and on what basis. On balance the tribunal found Mr. Louther's evidence unsatisfactory.

FACTS

11. The claimant was employed from 2 July 2018. He was dismissed via a phone call on 24 June 2020. If notice had been provided his dismissal on notice would have expired on 1 July 2020. The claimant gave evidence that he believed his employment started a week or two before this date when he was called in with others to assist the respondent in clearing up the warehouse after a with a fire and he was paid. The respondent disputed this and the evidence of Mrs. Farnden was that a fire occurred at the West Bromwich site on 21 and 22 June 2018. During the week of 25 June 2018, the loss adjusters attended the site and the respondent was not permitted to undertake any clean up of the site. Her evidence is that the week the claimant joined the respondent was the week spent cleaning up the site. This was accepted by the Tribunal. The claimant had stated in his ET1 his employment started on 2 July 2018 and repeated this at the preliminary hearing before Employment Judge Gaskell in September 2021. It was the first time at the final hearing that the claimant suggested an earlier start date. The Tribunal noted that he had signed receipt of the employee handbook and his contract on 15 June 2018 but the contract specifically noted a start date of 2 July 2018. Further the pay slip dated 31 July 2018 (page 155) showed it was the claimant's first payslip for a pay period of 4 weeks. The Tribunal determined that it was more likely than not, that the claimant commenced his employment with the respondent on 2 July 2018 and he assisted with clearing up the fire damage that week.

12. The respondent is a provider of ceramic tiles and sanitaryware and has 84 employees. It has two U.K. sites; the head office and warehouse in Petersfield Hampshire and a second distribution warehouse and showroom in Birmingham. At the relevant time the respondent had an in house human resources adviser Ms. Jackson. The workforce is multi-cultural with drivers who are white British, Pakistani, African, and middle eastern.

13. The claimant was initially interviewed by Mr. Ellridge for the post of multi-drop driver and was successful in securing that post. Further he was recommended by Mr. Louther to be appointed as a Lead Driver on 4 July 2019 (page 91). This role involved him attending the site first at the beginning of the day and returning first at the end of the day. The claimant had responsibility to deal with any issues raised by drivers. His driving duties were reduced. He received an increase in pay. The claimant had a good work ethic and was considered by the respondent to be trustworthy. It is not disputed that the claimant had an exemplary employment record.

14. At the start of the national lockdown due to the pandemic the respondent requested the drivers including the claimant to stay at home on full pay. After a few weeks the drivers were requested to attend work. Modifications were made to the driver's shifts so that they did shorter hours. The hours were changed from 7 am to 4 pm. There was dissatisfaction amongst the drivers as to the steps taken in the workplace to protect them. The claimant's evidence is that the respondent continued to require drivers to place their thumb in a machine to show they had attended work, there was no hand sanitizer and no masks.

Further there was a concern about social distancing; drivers tended to collect in the canteen and wished to leave the workplace by 4 p.m. The respondent relied upon its emails which indicated that there were modifications to the signing in process by dispensing with the thumb identification (dated 26 March 2020 page 150) and using a fire register; memo dated 13 March 2020 informing all staff about international travel (p.152). On 18 March it was said that an instruction to customers and drivers was provided (page 153-4) so not to request a signature from customers accepting a delivery. There is no mention in the instruction about hand sanitizer or face masks. The claimant disputed these steps were taken and in fact he had never seen the advice to drivers. He relied upon the concern he raised on the telephone to Ms. Jones on 30 April 2020. His evidence was that he informed her that there was a lack of PPE, hand sanitiser, social distancing, and drivers wanting to go home at 4pm because they could not socially distance. The respondent did not call Ms. Jackson as a witness in the case. The Tribunal concluded the communications were made but there was no evidential trace that the claimant was served with this information. Further by the time the drivers returned to work following the lockdown they were using the thumb identification again. Mr. Louther in his evidence agreed he did hold the view the COVID pandemic was a conspiracy theory and not real and discussed his view at work. The Tribunal considered Mr. Louther did not communicate the health and safety steps suggested in the emails to his drivers because he simply did not believe that the pandemic was a real issue.

15. In respect of the concern raised by the claimant with Ms. Jackson the Tribunal finds that on the balance of probabilities the claimant did raise with her that Mr. Louther was suggesting the COVID pandemic was a conspiracy theory (Mr. Louther accepted in cross examination that he held this opinion); Mr. Louther was shaking hands with people; there was a lack of social distancing with no hand sanitizer and no masks. The Tribunal reached this conclusion because it heard the claimant's evidence of the conversation and Ms. Jackson had not attended the tribunal to be cross examined about her evidence. Mrs. Farnden informed the Tribunal she was told by Miss. Jackson that the claimant had only raised issues about drivers wanting to leave the premises at or just before 4pm. Ben had instructed drivers they had to wait until 4pm. The claimant also raised that Mr. Louther was intimidating. The Tribunal rejects the written representation of Ms. Jackson and prefers the first hand direct evidence of the claimant. Mrs. Farnden can only tell the Tribunal what she was told by Ms. Jackson and not what the claimant actually said.

16. Although Mr. Louther was unable to specify who, he accepted that someone from the respondent informed him the claimant had raised a health and safety concern to H.R. Mr. Louther invited the claimant to a meeting and informed the claimant he was disappointed that he had raised a health and safety concern to HR about him. Although Mr. Louther appeared to dismiss the concern raised by the claimant in his evidence as having no effect on him, the Tribunal did not accept his evidence. The Tribunal concluded that Mr. Louther was angry and concluded he viewed the claimant's complaint to H.R. about him as undermining. As a manager he should have recognised that the claimant when raising the health and safety concern was only following previous advice given by management to him dated 4 July 2019 that health and safety risks should be

reported. The Tribunal accepted the claimant's evidence that Mr. Louther did hold a grudge against him and this was evidenced by the fact he invited the claimant to a meeting to express his disappointment with him.

17. The respondent relocated its premises from West Bromwich to Birmingham in or about January 2019. At the stock take in December 2019 a large shortage of stock was noted of in excess £170,000. Theft (along with the disparate storage of stock) were considered to be reasons for the loss. A tip off that customers were being offered stock directly to customers was made to the management in the early part of 2020. The senior management determined that the cost of installing CCTV was too great and instead Mr. Louther would attend the premises early and stay late to ensure no unallocated stock made its way into driver's vehicles. He was the only keyholder for the warehouse so he would be the first to arrive and the last to leave. Towards the beginning of lockdown, a private investigator was instructed but this was a few days before lockdown and this was not pursued by the respondent after employees returned to work.

18. Keys for the vehicles are hung up on a rack in the canteen which meant they were accessible to anyone in the workplace. Keys should be left by the drivers at the end of the day on the rack. There was no disciplinary offence pursuant to the driver's handbook of failing to leave the keys at the workplace. The practice is that the drivers should leave the van keys in the workplace overnight unless storing the van overnight at home (with the consent of management). However, on occasions drivers did forget to return the keys. This is evidenced by the claimant's text message to Mr. Louther on 2 April 2019 (page 126). On occasions, Mr. Louther had reminded drivers where he noticed a key missing to return to the site to return keys inadvertently removed. No employee had been previously disciplined for taking the keys from the site.

19. The method adopted to loading a van from about April 2020 was that items were picked by a fork lift truck or truck driver and then loaded onto the vehicle. The vans were placed in a row in the warehouse under the van's registration number and the delivery schedule would be printed off. This was then checked off against the product then loaded when the driver returned. The driver would check the product on the warehouse floor and then against when it was loaded. The driver would usually witness the loading and tell the counterbalance for list driver how he wanted the product loaded onto his van. The drivers would check the stock loaded at the end of the day (for the next day) or in the morning before delivery with paperwork for the allocated stock before commencing their journey. A pallet of ceramic tiles is generally taken by hauliers because of their weight and handling issues; a pallet can weigh one tonne. Van drivers can carry a weight of 1.2 tonnes load. Van drivers could sometimes take boxes of tiles. Product loaded onto a van should have appropriate paperwork so that it tallied to a customer's order. Sometimes products were wrongly placed in vans by reason of a wrong pick or wrong allocation to the van and the product would be returned by the driver to the site.

20. On 4 June 2020 Mr. Louther received a tip off from an employee that stock had gone missing and that he should check vans. In his oral evidence he also stated a customer had given the Head Office a tip off that product was being offered

by drivers. He stated that the tip off did not name the claimant as being responsible for this. When everyone had gone home he checked all of the vans to see what was on them. There were three sets of keys from three vans missing. He found two sets of keys in the respective vans. He sent a whatsapp message to drivers that he found two sets of keys which the Tribunal did not see but accepts was sent. Mr. Louther was unable to check the claimant's vehicle because it was locked and the van keys were not on the canteen rack. He telephoned the claimant to ask him if he had the keys. He did not answer so called the claimant again. A brief conversation took place. The claimant was unable to confirm he had the keys because he was not at home, he was out. Mr. Louther requested the claimant to contact him if he found the keys. The claimant did not phone back. The claimant returned home at about 9.30p.m after viewing a vehicle to purchase with a friend and on arrival at home was informed that his son had injured his ankle playing football and was in pain. As it was approaching 10 pm the claimant decided not to call Mr. Louther and did not consider it was an urgent matter; Ben had not called again and the claimant was due to attend work early the next morning.

21. The claimant attended work at 7.10 am. Ben was already at site from about 6 a.m. The claimant did not go to the office which would have been usual practice for him to collect the keys of the van but went straight to his vehicle because he knew he had the keys already. Also, other drivers had already left because he was later than usual. He described to the Tribunal having a difficult night because his son was in pain and very restless. As the claimant approached the vehicle in the yard the claimant acknowledged Mr. Louther with a hand gesture so Mr. Louther called his name and walked over to him to ask him about why he had not contacted Mr. Louther the night before about the van key. The claimant explained that his son had been injured and he needed to sort it out. Mr. Louther said *"ok but before you go would you mind if I had a quick look insider the van".* The vehicle was reversed up against a barrier so Mr. Louther could not access the back of the vehicle so he asked the claimant to pull forward so to open the back doors. When the door of the van was open, Mr. Louther checked the paper inside the vehicle and the claimant stated that the pallet tiles should not be on the van. Mr. Louther requested the claimant to close the van doors and back the van up and pass him the keys to the van and to go to the office. He asked the claimant who had loaded his vehicle last night and he said Karl Taverner. Mr. Louther took the claimant to the office accompanied by Rubel Miah to take notes . He informed the claimant that as he could not explain why the pallet of tiles were on his van with no paper work he would suspend the claimant on full pay. An investigation would take place. On 5 June 2020 the claimant was suspended by Ben Louther, Warehouse Operations Manager. Mr. Louther said that as the claimant did not have a licence to drive a forklift truck someone potentially could be involved. A letter confirming the suspension was sent to the claimant on the same date by Jennifer Jackson, HR Advisor.

22. The investigation allegations were set out in the letter (page 95) and were :-
    (a)you being in authorised possession of company property. Namely the removal of company vehicle keys for vehicle NU69 UMB from your place of employment and the unaccounted for stock held subsequently found within that company vehicle;

(b)suspicion of your failure to comply with company rules relating to the movement and loading of stock.

23. The claimant was informed these allegations were gross misconduct. Mr. Louther undertook an investigatory interview with Karl Taverner on 5 June 2020 (page 97-8). Heather Farnden was present in this meeting. Mr. Taverner stated that Manny had made the pick for the van and had shrink wrapped all items into 2 pallets. Despite there being 5 separate deliveries to be made. He had been requested by the claimant to load the vehicle from the side and to place the two pallets at the front of the van. He denied that he had loaded the pallet of tiles. Once loaded the claimant moved the van in the yard. He denied loading the tiles. Later that day (page 99) Mr. Louther called five drivers to separate meetings in the presence of Mrs. Farnden. They were asked the same questions namely name all the people who could drive the counterbalance, if they had loaded the pallet of tiles onto the claimant's van, if they knew anything or had seen anything suspicious on 4 June 2020. They named all 5 drivers who could drive a counterbalance for loading pallets but all denied loading the claimant's van. On 8 June 2020 further investigation meetings took place (p.100 to 103). An employee (2) stated he was aware who had loaded the vehicle because he was outside and the pallet went on. He identified that employee (3) was responsible. He was any eye witness but was not prepared to publicly accuse (3). In the course of the investigation, Mr. Louther asked the employees whether it was normal practice that employees take home keys. It was clearly not practice. He did not ask anyone whether it actually occurred and how frequently. Mr. Louther was asking questions suggested to him by senior management which included Mrs. Farnden. Other than employee 1 no one else identified who loaded the pallet onto the claimant's van.

24. A telephone investigation meeting with the claimant took place on 11 June 2020 and was conducted by Mr. Louther. In the investigation meeting or following the meeting, Mr. Louther did not make any findings of fact or recommended disciplinary action. He was requested simply to conduct the investigation hearing. It is unclear as to who determined that the claimant should face a disciplinary hearing and on what basis.

25. In the course of the investigation meeting, Mr. Louther did not mention to the claimant that someone had been seen loading the pallet onto the van so that the claimant was not given an opportunity to comment on this. The claimant explained by accident he took the key home and apologised. The claimant stated that he thought someone was playing a prank or joke on him. He couldn't have loaded the van because he doesn't have a fork lift truck licence. The claimant raised at this stage that there was extra product on the vans with no paperwork and this occurred frequently; it was a common occurrence. The claimant said he did not know the tiles were on the van. The claimant said the pallet of tiles on his van might have been a return. He explained the reason why he didn't come back late in the evening to Mr. Louther's enquiry about the van keys was that he didn't think it was urgent and he was in 7 am the next day anyway. The claimant stated Karl had loaded his vehicle and he left it unattended in the yard for one hour to attend to other work. He then parked it up at the end of the shift and locked it. He did not realise there was any extra

weight to the vehicle when he did so. He also stated when he was asked to move it forward by Mr. Louther on 5 June he did not notice the extra weight on the vehicle.

26. On 17 June an employee 3 was interviewed and he said he had picked for the claimant's vehicle and he picked 6 orders. He told Mr. Louther that he hadn't loaded it. There was no push back by Mr. Louther based on employee 2's eye witness evidence that he had actually been seen putting the pallet on the claimant's vehicle. Mr. Louther was unable to explain to the Tribunal why he failed to do this.

27. The claimant was invited to a disciplinary hearing on 19 June. It is unclear how this decision was made and on what basis. Mr. Louther said he did not make any findings of fact nor did he recommend the claimant for disciplinary action. There was an evidential gap in the respondent's case as to how on the basis of his interview with the claimant and others in the warehouse a decision was made to move the claimant to a disciplinary hearing.

28. A disciplinary meeting was scheduled for 24 June 2020 by letter dated 19 June 2020 (page 111). In that invitation letter the allegations which the claimant faced were not set out. He was provided with the statement of Mr. Louther, meetings with others 5 June 2020 and 8 June 2020 notes of interview with claimant on 11 June and notes from the meeting with employee 3. The invitation letter mentioned gross misconduct without particularising the allegations.

29. The claimant texted Mr. McAllister that his brother had passed away and a the claimant's request the disciplinary hearing was subsequently re-scheduled to 29 June 2020. However, the disciplinary meeting did not take place. The advice from H.R. to Mr. McAllister was that a summary decision to dismiss the claimant could take place. Mr. McAllister, Finance Manager felt uneasy about rushing the process through in circumstances that the 2 year anniversary of the claimant's of employment was approaching and his brother had died. However, he followed the HR advice and concluded that there was sufficient information to dismiss the claimant with effect from 24 June 2020. His evidence was that he was satisfied that gross misconduct was the appropriate sanction. He stated *"I considered the fact that we had been tipped off that there was an issue with a van, the keys of that van were not available, Ansar failed to provide those keys on the evening he was asked for them, when he arrived at work the next day he went straight to his can which would have allowed him to drive straight off rather than go via the office and he had no explanation for the pallet of tiles was in his van."* He did not consider any other disciplinary sanction other than dismissal and did not take account of the claimant's exemplary work record either informing him that the claimant may have been telling the truth or in the selection of the disciplinary sanction.

30. Mr. McAllister telephoned the claimant on 24 June 2020 when the claimant was attending his brother's funeral. He invited the claimant to telephone him back as soon as the claimant was finished that day. When the claimant did so, he was he was being dismissed by Mr. McAllister. By letter dated the claimant was

informed he was dismissed (page 116). It stated that the claimant was "*entitled to one months notice to include the one week of statutory notice which you are not entitled to work and will be paid in lieu along with any outstanding holiday entitlement not taken."*

31. By letter dated 25 June 2020 the claimant appealed the dismissal. The appeal was heard by Mr. Andy McAllister (who had dismissed the claimant) on 8 July 2020. The grounds of the claimant's appeal (page 118) were (a)not being given an adequate chance to explain himself; (b)inaccurate minutes of investigation meeting; (c)investigation should not have been conducted by Ben Louther; (d)There should have been a disciplinary meeting(e)He could not have loaded the tiles into his van; (f)He did not believe he was in unauthorised possession of company property (g)He was unfairly treated compared to others (h)There is no specific gross conduct offence of taking vehicle keys home. The claimant stated the dismissal was too harsh; he had not been given a chance to explain his side of the story; he took issue with the accuracy of the investigation interview notes, he mentioned unauthorised stock was a regular occurrence in a van on site; he took the keys home by mistake and on previous occasions no action had been taken.

32. He was invited to attend appeal hearing on 8 July (page 121). The Claimant provided a detailed witness statement (p.122) and provided a text message about keys being taken by a driver (p.126) to demonstrate drivers do take keys home. In his detailed statement the claimant raised that he had been an exemplary employee with no complaints and had been praised for his judgment and initiative. He had also been promoted. He set out the events of 4 June 2020 which included the loading of the van by Karl, leaving the van for one hour unattended to carry out other work and not checking the van or its contents that day. He returned to the van later that day and parked it up. He explained about the phonecall from Mr. Louther and his personal circumstances that evening. He apologised for taking the keys and listed a number of other employees who had taken a fuel card or phone away from work who has not faced disciplinary action. He described running late on the morning of 5 June. He stated that unaccounted stock by mistake is loaded by warehouse drivers on occasions and the unaccounted stock when discovered is brought back to the respondent's premises by the drivers. The claimant repeated his points in the appeal on 8 July 2020 and the notes are set out at page129.

33. The respondent stated that although Andy McAllister heard the appeal, Heather Farnden, General Manager, who did not attend the appeal hearing was the decision maker on the appeal. She reviewed the notes of the appeal and the claimant's representations and summarised her decision in a letter to the claimant on 23 July 2020. The claimant's appeal was not upheld.

Claimant's Submissions

LAW

Unfair dismissal

34. To bring a claim of "ordinary unfair dismissal" an employee must have continuity of service with an employer for a period of two years pursuant to section 108 (1) of the Employment Rights Act 1996. The calculation of the period of two years includes the first and last day of employment (the effective date of termination).

35. Pursuant to section 97 (2) of the Employment Rights Act 1996 the effective date of termination is the later date of where (a)the contract of employment is terminated by the employer and (b)the notice required by section 86 to be given by an employer would if duly given on a material date expire on a date later than the effective date of termination.

36. The burden rests upon the respondent to establish the reason or principal reason for the dismissal. Misconduct is an admissible reason. If the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair. In conduct cases when considering the question of reasonableness the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell (1980) ICR 303.** The three elements of the test are :

    (a)Did the employer have a genuine belief that the employee was guilty of misconduct?

    (b)Did the employer have reasonable grounds for that belief?

    (c)Did the employer carry out a reasonable investigation in all the circumstances?

37. The case of **Sainsbury's Supermarkets Limited v Hitt (2003) ICR 111** establishes that the band of reasonable responses applies to all three stages above and in considering sanction the Tribunal should focus on whether the sanction of dismissal fell within the band of reasonable responses. The Tribunal may not substitute its own view for that of the employer as made clear in the case of **London Ambulance Service NHS Trust v Small (2009) EWCA Civ 220.** The appropriate standard of proof for those at the employer who reached the decision was whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They did not need to determine or establish that the misconduct was committed beyond all reasonable doubt.

38. In considering the investigation undertaken the relevant question for the Tribunal is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where the tribunal is considering fairness, it is important that it looks at the process followed as a whole including the appeal. The Tribunal is also required to have regard to the ACAS code of practice on disciplinary and grievance procedures.

39. The ACAS Guidance on disciplinary proceedings suggests the following factors may be relevant when determining what if any disciplinary penalty to impose; whether the employer's rules indicate the likely penalty; the employee's disciplinary record, work record, experience and length of service; whether there are special mitigating circumstances which might make it appropriate to adjust the severity of the penalty and whether the proposed penalty is reasonable in all the circumstances.

40. The issue of procedural irregularities was considered by the Court of Appeal in the case of **Taylor v OCS Group (2006) EWCA Civ 702** which involved a claimant who was dismissed for misconduct. The tribunal found that the disciplinary process was fundamentally flawed because during the disciplinary hearing the claimant had been unable to understand the proceedings (the

claimant was profoundly and pre-lingually deaf). Whilst the principal point on appeal was that tribunals in considering whether an appeal process cured the earlier defects should not ask whether the appeal was a review or a re-hearing the Court of Appeal went on to explain that in cases where there are procedural irregularities procedural fairness should not be considered separately from other issues. The Tribunal should consider the procedural issues together with the reason for the dismissal as the two impact upon each other and the tribunal's task is to decide whether in all the circumstances the employer acted reasonably in treating the reason as sufficient reason to dismiss. The Court of Appeal explained that in cases where the misconduct that founds the reason for dismissal is serious a tribunal might decide (after considering equity and the substantial merits of the case) that notwithstanding some procedural imperfections the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct is of less serious nature so that the decision to dismiss was nearer to the borderline, a tribunal might well conclude that a procedural deficiency had such an impact that the employer did not act reasonably in dismissing paragraph 48. This approach was re-iterate in the case of **NHS 24 v Pillar UKEATS/005/16** in which it was explained that the danger of treating procedural unfairness separately is that it can result in a failure to assess the gravity of the procedural defect. If there is no real relationship between an unfair step in the procedure and the ultimate outcome the impact of that procedural defect may well be far less than where an absence of any proper procedure led to substantive unfairness.."

Contributory Fault

41. Pursuant to section 123 (6) of the Employment Rights Act 1996 the Employment Tribunal may reduce the compensatory award where it considers it to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action by the employer. The starting point is to consider whether the claimant had been guilty of "blameworthy conduct" (**Nelson v BBC (No. 2)).** The next stage is to consider whether the blameworthy conduct contributed to or caused the dismissal. If so the Tribunal should consider to what extent the blameworthy conduct contributed to or caused the dismissal and apply the appropriate deduction to compensation.

Polkey

42. The Tribunal has a discretion to make a reduction to the compensatory award to reflect the percentage chance that the claimant would have been dismissed fairly in any event (**Polkey v AE Dayton Services Limited 1987 IRLR 50**). The deduction can take the form of a finding that the individual would have been dismissed fairly after a further period of employment (a period in which a fair procedure would have been completed). In the case of **Andrews v Software 2000 Limited 2007 IRLR 568** set out principles to be applied conducting this assessment. Having considered the evidence the Tribunal may determine that (i)if fair procedures had been complied with the employer has satisfied it, the onus being firmly on the employer, that on the balance of probabilities the dismissal would have occurred when it did in any event; (ii)that there was a

chance of dismissal but less than 50% in which case compensation should be reduced accordingly (iii)the employment would have continued but only for a limited fixed period or (iv) employment would have continued indefinitely.

Direct Race discrimination

43. Section 13 of the Equality Act 2010 states "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.

44. Pursuant to section 23 (1) of the Act, on a comparison for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

45. Section 136 (2) and (3) of the Equality Act 2010 states

"(2)If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision 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."

If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efobi (2019) EWCA Civ 18** it was confirmed that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove on the balance of probabilities those matters which he wishes the tribunal to find as facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred.

46. To establish a prima facie case, the Claimant has to show that she was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:

'The bare facts of a difference in status and a difference in treatment only indicate 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".

(***Madarassy v Nomura International plc*** **[2007] ICR 867** at [56] *per* Mummery LJ)

Public Interest Disclosure dismissal

47. Section 43A of the Employment Rights Act 1996

"In this Act a protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

48. 43B Disclosures qualifying for protection

"(1)In this Part a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –

(d)that the health or safety of any individual has been, is being or is likely to be endangered,

49. The word "likely" in section 43B (1) requires more than a possibility or a risk that a person might fail to comply with a legal obligation or that the health and safety is endangered. The information had to tend to show that it was probable or more probable than not that there would be a breach (see **Kraus v Penna PLC 2004 IRLR 260** at paragraph 24). The words "in the public interest" were introduced by amendment with effect from June 2013. The Court of Appeal in **Chesterton Global Limited v Nurmohamed (2018) ICR 731** held that the question for the Tribunal was whether the worker believed at the time he was making it, that the disclosure was in the public interest; whether, if so, that belief was reasonable; and while the worker must have a genuine and reasonable belief that disclosures is in the public interest that does not have to be his or predominant motivation in making it.

50. The Court of Appeal in **Kilraine v Wandsworth London Borough Council (2018) ICR 1850** confirmed the judgment of Mr. Justice Langstaff in the EAT confirming that there is no such rigid dichotomy between making an allegation and conveying information so that a disclosure may be a mixture of the two and it is important to consider the context of the disclosure and "in order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)." This is further supported by the Court of Appeal's case of **Simpson v Cantor Fitzgerald Europe (2020) EWCA Civ 1601.**

51. When assessing the reasonableness of the belief held, it is a matter for the Tribunal to determine **Babula v Waltham Forest College (2007) ICR 1026.**

52. Pursuant to section 103A of the Employment Rights Act 1996 and following **Kuzel v Roche Products Limited (2008) EWCA Civ 380** when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case such as making protected disclosures. The employee does not have to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show that the reason advanced by the employer for the dismissal and to produce some evidence of a different reason.

53. Following the Supreme Court in **Royal Mail Group Limited v Jhuti** if an employee in the hierarchy of responsibility above the employee such as their line manager deliberately hides the real reason for dismissal behind an invented reason which the decision maker adopts such as pretending it is performance related rather than whistleblowing the reason for the dismissal is the hidden reason rather than the invented reason.

Submissions

54. The respondent provided a written submission and supplemented this with oral submissions. The respondent accepted the claimant had sufficient service to bring a claim of unfair dismissal but disputed that it was unfair. Its case is that the claimant was dismissed for having unaccounted stock on his vehicle and that the respondent had undertaken a reasonable investigation. Although it was accepted by the respondent that it failed to hold a disciplinary hearing on the misconception that the claimant did not have two years qualifying service, any procedural deficiencies were remedied at the appeal hearing. The claimant accepted he provided all the detail he wanted at the appeal hearing orally and in writing. It argued in the circumstances that a different process would not have resulted in a different outcome. Further there should be a 100% deduction from the claimant's compensation by reason of contributory fault because it argued that having unauthorised product in his van with a view to removing them from the respondent's site was a sackable offence; there was an intention to deprive the respondent of income. The claimant must have been involved in the tiles being on his van.

55. The claimant submitted that false grounds were given to dismiss him. The main reason for his dismissal was his public interest disclosure. Mr. Louther's attitude changed towards him following hid disclosure to H.R. Mr. Louther had informed the claimant he was not happy with the fact he complained to H.R. The claimant had raised a genuine concern about health and safety. Further he was dismissed because of his race. Other employees had not been disciplined for taking keys home. In fact others had committed more serious incidents of misconduct and not been dismissed. His case was that Mr. Louther influenced Mr. McAllister and Mrs. Farnden to get rid of him. There was no follow up of the allegation by a colleague they had witnessed employee 3 loading the pallet on the claimant's van. The account of the eye witness was not put to employee 3. He submitted it was a sham dismissal and he was deliberately targeted. Mr. Louther was the step son of the Managing Director and shared his name with him. He was dismissed on the day of his brother's funeral. There were often mis-picks of product. The claimant put a 4 page appeal letter in but it was ignored. He was not guilty of any contributory fault.

56. The claimant stated he felt he had been given a fair opportunity to put his case before the Tribunal.

Conclusions

57. The Tribunal raised on day 2 with the parties that if the claimant was employed from 2 July 2018 until 1 July 2020 pursuant to section 97 (2) of the Employment Rights Act 1996 he had sufficient service to bring a claim of unfair dismissal pursuant to sections 95 and 98 of the Employment Rights Act 1996. Section 97 (2) of the Employment Rights Act 1996 states that where an employer dismisses an employee and should have given notice then the effective date of termination of the contract will be considered to be one week after the actual date. The length of service is calculated by taking into account the first day and the last. On this basis the claimant has two years service. If the dismissal is for gross misconduct then no notice would be required and the additional notice period can not be added for the purpose of calculating 7 days a week. During its

submission, the respondent accepted the claimant did have 2 years service to bring a claim of "ordinary" unfair dismissal.

58. The Tribunal for the reasons set out below, did not find that the claimant had committed gross misconduct and determined that the claimant having been served with notice by letter dated 24 June 2020 was entitled to commute a further week pursuant to section 97 (2) of the Employment Rights Act 1996. The addition of this week meant that the claimant was employed from 2 July 2018 to 1 July 2020 (both 2nd July and 1 July 2020 are counted); therefore, the claimant had two full years of employment and was entitled to bring a claim of unfair dismissal.

The reason for dismissal

59. The Tribunal concluded upon hearing all of the evidence that the reason for the claimant's dismissal was the unallocated stock on the claimant's van. Mr. McAllister made the decision to dismiss and did so without following a full disciplinary process. An investigation did take place following the discovery of unallocated stock on the claimant's vehicle following the claimant taking keys from the site and not contacting his manager on request to confirm he had the key at home. The respondent suspected the claimant knew that the unallocated stock was present on his vehicle and did so with an intention of removing the product from the respondent's site.

60. Although the claimant contended that the decision maker Mr. McAllister was influenced by Mr. Louther or by the Managing Director (related, he contended to Mr. Louther), the Tribunal found on the balance of probabilities that Mr. McAllister formed his own opinion as to the guilt of the claimant of having product in the vehicle. Mr. Louther disputed he was related to the Managing Director and there was no evidence to support the claimant's contention. The Tribunal found a familial relationship had not been established between the managing director and Mr. Louther. The Tribunal concluded that Mr. McAllister formed this view on the basis of the investigation interview with the claimant conducted by Mr. Louther and interviews with employees at the site. Mr. McAllister had been given all the paperwork. However, his speedy decision to dismiss the claimant was motivated by the advice he received from H.R. that he could summarily terminate the claimant's employment.

61. Mr. McAllister was a senior member of the management team. He relied upon HR advice and determined that the claimant could be dismissed for misconduct. In the circumstances the Tribunal finds that the reason for the claimant's dismissal was conduct, an admissible reason pursuant to section 98 (2)(b) of the Employment Rights Act 1996.

The Burchell test -

62. The Tribunal concluded that the respondent failed to conduct a reasonable investigation in all of the circumstances and the Tribunal was not satisfied that there was a careful and conscientious investigation of the facts so to form a reasonable belief in misconduct.

63. First on the basis that the claimant had raised a concern about Mr. Louther's failure to follow health and safety practices during the pandemic which had upset Mr. Louther, the Tribunal determined that a reasonable employer would have recognised it was a flaw to permit Mr. Louther to investigate the claimant. The Human Resources officer who appeared to the Tribunal to have been offering advice to the managers in the the investigatory/disciplinary process were well aware of the concerns raised by the claimant about Mr. Louther. In fact it was accepted by the respondent and part of its case that the claimant had raised a concern about Mr. Louther and his management of the team directly with the H.R. officer. Despite failing to recognise that the claimant was potentially making a public interest disclosure on 30 April 2020, a reasonable employer should still have been cognisant of the fact that permitting Mr. Louther to investigate the claimant for potential misconduct could present a potential conflict. Further Mrs. Farden played two roles in the disciplinary process; at the investigation stage she sat in on interviews with drivers about the incident; she also suggested questions that Mr. Lowther should ask in the investigation and also acted as the appeal officer. Mrs. Farnden accepted in retrospect that this presented a potential conflict. The Tribunal also found that It was also a breach of the ACAS code of practice.

64. The investigation conducted by Mr. Louther was at the very least incomplete. Its focus was on the assumption that the claimant must have known the unallocated product (a pallet of tiles) was on the vehicle and the claimant had no explanation so he must be guilty. Although Mr. Louther at no time articulated to the claimant why he believed a disciplinary hearing was appropriate the implication in cross examination of the claimant was that the respondent believed that the claimant would have detected the load when he moved the vehicle to park it up on the afternoon of 4 June; the claimant took the keys home the night before and did not contact his manager; on 5 June he went to the van without going to the office. However, the investigation failed to put to the claimant at anytime the eye witness account that employee 3 had been seen loading the van with the pallet. The investigation failed to enquire with employee 3 that he had actually been seen loading the pallet. It was not put to the claimant whether he knew that employee 3 placed the pallet of tiles on his van. The consistent evidence of the claimant and Mr. Taverner (his written account) was that Mr. Taverner placed two pallets of items on the van. The claimant then attended to other issues for over one hour. There was no investigation of the timings or who was on site at the time when both the claimant and Mr. Taverner had completed the loading and were not present. The respondent failed to pursue any other lines of enquiry and assumed guilt of the part of the claimant because he could not explain why the stock was in his vehicle. This ignored the fact that the claimant had left his vehicle following loading by Mr. Taverner for one hour when it was accessible by others and the eye witness who saw employee 3 put the pallet on. They assumed the claimant knew. This flew in the face of an employee who had been promoted because of his work ethic and was a trusted employee with an exemplary work record.

65. As for not heading to the office on his arrival of work, a reasonable employer would have taken cognisance of the fact that the claimant already had the van keys; this does not appear to have been considered. The respondent was suspicious that the claimant did not call back his manager on the evening of 4 June but the claimant had provided an explanation his son was unwell. This explanation was not taken into account by the respondent despite the context of an exemplary work record of the claimant. The respondent conceded that if the claimant knew about the tiles he could not have acted alone; he has no fork lift truck licence; someone must have loaded it onto the claimant's van. The respondent failed to further investigate as a reasonable employer would should have done the eye witness account it was employee 3 and why employee 3 did this. There was an assumption of guilt on the part of the claimant and no account was taken that the load could have been misloaded or any other intent on the part of employee 3.

66. The respondent decided not to hold a disciplinary meeting at all. The respondent's intention had been to hold a disciplinary hearing on 19 June but it was postponed because the claimant's brother had passed away. It was adjourned to 24 June but on the basis that the respondent considered it could summarily dismiss the claimant, it decided to dispense with the hearing and dismiss him. This was in breach of the ACAS Code of Practice to fail afford the claimant any opportunity to put his explanation or case forward. The respondent conceded it rushed through the claimant's dismissal. He was telephoned on the day of his brother's funeral 24 June 2020 by Mr. McAllister. The claimant informed him he was attending his brother's funeral. The claimant was then requested to call back. When the claimant did phone back he was informed that he was dismissed. It was brutal of the respondent to have treated the claimant in this manner.

67. The claimant submitted an appeal on 25 June 2020 at page 118. He stated the dismissal was too harsh; he had not been given a chance to explain his side of the story; he took issue with the accuracy of the investigation interview notes, he mentioned unauthorised stock was a regular occurrence in a van on site; he took the keys home by mistake and on previous occasions no action had been taken. The fact that the claimant alerted the respondent that unallocated stock is regularly in vehicles should have placed a reasonable employer on notice to consider whether it had been misloaded. The appeal was heard by the dismissing officer Mr. McAllister who was also the dismissing officer. The decision maker on appeal was Mrs. Farnden who was not actually present at the appeal and who was involved in the investigation. She accepted in her evidence with retrospect wearing two hats in the process presented a conflict. The Tribunal finds also a breach of the ACAS code of practice. At the appeal hearing the claimant presented a detailed appeal statement. He continued to state he was unaware that the stock was on his vehicle and that unallocated stock was a regular occurrence. He compared his treatment with others who were not disciplined. However, the claimant accepts that none of the individuals he relied upon took keys home and had unallocated stock in a van.

68. Mr. McAllister states had he seen the statement at page 122 at the time of his dismissal decision it would have made no difference to his decision and he still would have dismissed the claimant. The Tribunal rejects this evidence. The key motivation for Mr. McAllister was to dismiss the claimant speedily. The process was rushed through so much so he told the claimant on the day of his brother's

funeral he was terminated. Mr. McAllister had read through the investigatory documents and on circumstantial evidence assumed the claimant's guilt. He performed no further analysis of the evidence. At the time of the appeal he had not undertaken any further investigatory steps to consider the significant point raised by the claimant that unallocated stock does go onto vans presumably by mistake and the claimant may in fact be innocent. This was not considered. He took no account of the exemplary record of the claimant in forming any reasonable belief that he knew the unallocated stock was on the vehicle.

69. Mrs. Farnden provided an outcome letter of the appeal at page 134. The respondent failed to consider the valid point of the claimant that he had not had an opportunity to explain himself. It ignored at the time of the investigation meeting the claimant was not provided with any evidence to comment upon. The outcome letter was dismissive of the claimant's appeal and the attitude of Ben following the claimant raising the health and safety point. The fact that an employee does not use the word grievance in a complaint does not mean that it is not a grievance or that it should not be taken seriously. Although the respondent accepted that the claimant did not load the vehicle the timing and events of that day had still not been investigated or analysed by the respondent by this point. A reasonable employer would have done so. Instead the respondent relied upon circumstantial evidence without further clarifying with employee 3 what he was doing on the day when he was seen loading the claimant's vehicle and whether the claimant knew.

Sanction

70. The dismissal of the claimant fell outside the band of reasonable responses. There was no consideration of any alternative sanction. The respondent wished to dismiss the claimant summarily and speedily. The respondent failed to form a genuine belief of misconduct on reasonable grounds following a reasonable investigation and instead closed its mind to an innocent explanation on the part of the claimant and on the basis of circumstantial suspicion, dismissed him. No account was taken in forming a belief as to his good work ethic and exemplary record and the fact he was a trusted employee. The sanction of dismissal was unduly harsh.

71. The Tribunal reminds itself of the Court of Appeal guidance in **Taylor**; it should consider the procedural issues together with the reason for the dismissal as the two impact upon each other and the tribunal's task is to decide whether in all the circumstances the employer acted reasonably in treating the reason as sufficient reason to dismiss. As set out above, the Court of Appeal explained that in cases where the misconduct that founds the reason for dismissal is serious a tribunal might decide (after considering equity and the substantial merits of the case) that notwithstanding some procedural imperfections the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee.

72. However, on the particular facts of this case the Tribunal finds that the dismissal was substantively unfair by reason of a failure to conduct a reasonable investigation and form a genuine belief in misconduct on reasonable grounds and procedurally unfair by failing to permit the claimant to have an opportunity to have his account heard and by the conflicts of the dismissing officer and appeal officer having multiple roles which conflicted in the process.

73. The Tribunal rejects the respondent's submission that there should be a Polkey deduction. The respondent relied upon circumstantial suspicion. Employees do take keys home and are not disciplined. Stock wrongly allocated can be found on vans. The claimant did not call his manager back on 4 June but he did provide an explanation namely his child was sick. He made his way to the van rather than the office because he had the keys. He did not detect the heavy load driving the vehicle to be parked at the sight. The respondent failed to undertake any further investigation based on the points raised by the claimant on appeal. They failed to investigate the regular occurrences of unallocated stock on vans or look further into the involvement of employee 3. The process here was so deficient the Tribunal finds that there is no sustainable Polkey argument.

74. In respect of contributory fault the Tribunal do not find there is any blameworthy conduct. The claimant did not call his manager back on 4 June but he did provide an explanation namely his child was sick. He made his way to the van rather than the office because he had the keys. He did not detect the heavy load driving the vehicle to be parked at the sight, This is not blameworthy conduct and the Tribunal makes not deduction.

75. The Tribunal finds on this case that the claimant was not in repudiatory breach of contract and the respondent was not entitled to summarily dismiss him.

Automatic Unfair dismissal

76. The respondent accepts if the claimant's evidence is accepted that he made a public interest disclosure to his employer. The Tribunal have already found that the evidence of the claimant is accepted.

77. The Tribunal also accept that the claimant did hold a reasonable belief that the absence of health and safety measures posed a risk to the public; not only other employees in the workforce, but to the wider public who received deliveries from the business and family members. The claimant held this belief on reasonable grounds. The tribunal takes account that when the claimant made the disclosure it was at the early part of the pandemic and there was a lot of fear and lack of knowledge. The Tribunal conclude the claimant made a protected disclosure to his employer

78. However, the Tribunal do not find that the public interest disclosure was the reason or principal reason for the claimant's dismissal. Mr. McAllister and Ms. Farnden were adamant as senior managers they were not influenced by Mr. Louther. The Tribunal finds on the balance of probabilities that this is correct. Although the investigation undertaken by Mr. Louther was inadequate both Mr. McAllister and Mrs. Farden formed their own view as to the claimant's involvement and were motivated to dismiss him on the understanding they could do so speedily. Although the investigation of the claimant by Mr. Louther was not reasonable in the circumstances, the Tribunal conclude that both Mr. McAllister and Ms. Farden formed their view on the basis of the incomplete investigation conducted by Mr. Louther and failed to take any steps to investigate further into this matter.

Direct race discrimination

79. Dismissal is an act of less favourable treatment. The claimant relies upon actual comparators. He informed the Tribunal that all of the comparators took keys home and were not disciplined. He was unable to say whether any of the

comparators had taken keys home and had unallocated stock in their vans. The Tribunal concluded that the suggested comparators were not actual comparators because they did not meet the threshold of section 23 of the Equality Act 2010 namely they were not in the same or similar circumstances. Furthermore, the Tribunal was of the view that any employee who was perceived by this employer to have been capable of being dismissed speedily would have been dismissed in similar circumstances. The claim of direct race discrimination fails.

80. In the circumstances the claim of unfair dismissal is well founded and succeeds. Other claims are dismissed.

Remedy

81. The claimant stated he was not sure what he was owed and did not pursue any notice or holiday pay. The Tribunal therefore dismissed these claims.

82. The claimant had two years service at the date of his termination and was aged 35 years. His gross salary was £376.35. He is awarded a basic award of £752.70.

83. The claimant gave evidence that he joined an employment agency and attended a number of interviews before securing a temporary role on 8 September 2020 with Chargery Services UK Limited. He then secured a permanent role with Arvato on 28 June 2020. Both jobs were for pay greater than his employment with the respondent. There is no argument pursued by the respondent that the claimant failed to mitigate loss. The Tribunal finds that the claimant act reasonably in seeking and finding alternative work and mitigated his loss.

84. The claimant was paid up until 25 July 2020. His loss of earnings actually runs from that date to 8 September 2020 a period of 6.5 weeks when he obtained a better paid job. His net loss for 6.5 weeks amounts to a net figure of £2,118.55.

85. Loss of statutory rights are calculated by the Tribunal at £500.

86. The claimant spent £100 attending interviews and applying and seeking jobs. He is awarded this sum.

87. In terms of the ACAS uplift the Tribunal determined this should be 20%. Although it is accepted that there was some process namely an investigation and an appeal hearing; it was limited.

88. No disciplinary hearing was actually held by the respondent nor was the claimant provided with the evidence collated prior to the decision to dismiss him.

89. Pursuant to paragraph 12 of the ACAS Code of Practice Disciplinary and Grievance Procedures 2015 it states *"At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given an opportunity to raise points about any information provided by witnesses."* The Tribunal determined that there was no such meeting which took place prior to the decision to dismiss whereby the claimant was given the opportunity to go through the evidence gathered and raise any points about the

information provided by witnesses. In particular in respect to the eye witness who had stated he saw a colleague load the claimant's vehicle with the tiles.

90. Paragraph 27 of the Code of Practice states *"The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case."* The appeal was chaired by the dismissing officer and yet determined by an officer involved in the investigation process who was not present at the appeal hearing. The Tribunal concluded that in this case paragraph 27 was not followed and as a consequence the claimant did not have a fair opportunity to put his case.

91. The Tribunal noted that there was some process followed here but deemed due to the failures in the process that it was just and equitable to uplift the claimant's compensatory award by 20%.

92. The Tribunal uplifts the compensatory award of £2718.55 by 20% which amounts to £543.71.

93. The total award made to the claimant (including basic award, compensatory and uplift) is £4,014.96.

Employment Judge Wedderspoon

17 August 2022

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