EMPLOYMENT TRIBUNALS

Claimant: Mr Solomon Egbe

Respondent: London School of Science and Technology Limited

Heard at: Watford Tribunal via CVP

On: 20, 21 and 22 September 2022 and considered in chambers on 9 November 2022

Before: Judge Bartlett, Mr Sagar and Mr Hoey

Representation

Claimant: in person
Respondent: Mr MacPhail, of Counsel

RESERVED JUDGMENT

1. The Claimant's claims for automatically unfair dismissal are dismissed.

2. The Claimant's claims for direct race discrimination (s13 Equality Act 2010) are dismissed.

3. The Claimant's claims for indirect race discrimination (s19 Equality Act 2010) are dismissed.

4. The Claimant's claims to have suffered a detriment under s47C ERA relating to dependent's leave are dismissed.

Decision and Reasons

The Hearing

1. The hearing was originally scheduled for four days commencing on 19

September 2022. As a result of the funeral of Queen Elizabeth II taking place on 19 September 2022 the hearing commenced on 20 September 2022. The tribunal considered that this did not materially affect the hearing time as it was decided on the first day that the hearing would deal with liability only, in part because the claimant had not prepared evidence of mitigation of loss, and that the tribunal panel would deliberate at a later date with judgement being reserved.

Preliminary Matters

2. At the start of the hearing a number of issues were raised which can be summarised as follows:

   2.1. the claimant had provided a new or supplementary bundle running to 275 pages on 12 September 2022 which was shortly before the hearing;

   2.2. the claimant had only provided the witness statement of himself and his five witnesses on 12 September 2022 which was shortly before the hearing;

   2.3. the respondent had made an adjournment application which was repeated at the start of the hearing.

3. Before the tribunal made a decision on the postponement application and how to deal with the new evidence there was a discussion so that the tribunal could obtain more information about the situation.

4. The respondents postponement application can be summarised as follows:

   4.1. the claimant failed to comply with the Employment Tribunal's directions or even the spirit of the directions for many months;

   4.2. the extremely late disclosure of the documents in the supplementary bundle and the claimant's witness statements has caused difficulties for the respondent and the respondent has had insufficient time to consider that material properly and prepare its case.

5. In oral submissions Mr Macphail set out a summary of the chronology relating to compliance or non-compliance with the tribunal directions concerning the preparation of the case. At the start of September 2022 and due to continued non-compliance by the claimant the respondent made an application for strike out of the claimant's case.

6. This strikeout application was considered and rejected by Judge Tobin. Judge Tobin made various orders such as to use the bundle prepared by the respondent in August 2022, for the claimant to provide any other or disputed documents in a supplementary bundle and for the claimant to provide his witness statements by 12 September 2022. It was accepted by Mr Macphail that the claimant had complied with those directions and orders.

7. Mr MacPhail submitted that:

   7.1. the claimant had deliberately failed to comply with tribunal directions

surrounding disclosure, preparation of the bundle and exchange of witness statements;

7.2. the respondent has had insufficient time to review the evidence in the claimant's bundle and the witness statements. It has had insufficient time to prepare a response to those matters set out in the claimant's witness statements; the claimant's witness statements contain a wide range of materials not raised in the claim for and therefore the respondent could not have sensibly anticipated all the new materials raised by the witnesses;

7.3. the respondent has been taken unawares having to deal with numerous new issues;

7.4. there were three options available to the tribunal. One is to proceed and allow all of the claimant's evidence in. Two is proceed but disallow the claimant's extra documents and Three is to postpone. Only the third option provides benefit to the claimant and the respondent and complies with the overriding objective; it is difficult to see how the case can be heard in three days with the five extra witnesses.

8. In response Mr Egbe submitted that:

8.1. everything started with a delay from the respondent;

8.2. he did not seem to accept his long and consistent failures in complying with disclosure, witness exchange and bundle preparation;

8.3. he had complied with the tribunal direction of 8 September 2022;

8.4. he only sought to add an additional 30 pages (sent to the tribunal and the respondent on the morning of 20 September 2022) because it was only on 16 September that the bundle had increased from 251 dated 283 pages;

8.5. he would be comfortable with the case proceeding on the basis of the documents disclosed by 12 September 2022.

9. There was some discussion about the relevance of the five witness statements from the claimant's witnesses.

10. All parties were reminded that the tribunal would make a decision on the issue set out in the list of issues which were decided at the case management hearing which took place in September 2021. The tribunal noted that the record of the CMH set out direction that if the claimant wished to raise new claims such as indirect discrimination he was to set this new claim now and amended claim. The claimant did this and the respondent responded with an amended response in October 2021. The respondent did not object at that time to the scope of the claimant's amendment. The tribunal reminded the claimant that the CMH did not give the claimant the opportunity to vastly expand his claim. Having reviewed the amendments to the claim in the amended response, the tribunal put to the respondent that it had been aware almost 12 months ago of matters raised in the witness statements that were also raised in the amended claim. In these circumstances it is difficult for the respondent to sustain its

argument that it had not had sufficient time to prepare its case. Mr Macphail responded that the witness statements go beyond what is set out in the amended claim.

11. The tribunal stated that, because two of the appellant's witnesses made complaints about their own employment or the termination of their employment with the respondent, that this case would not involve a mini hearing of events relating to dismissal or disciplinary of other ex-employees of the respondent.

12. The tribunal asked the claimant what were the relevance of the three witnesses: Mrs Abbas, Mr Thomas and Mrs Ajayi. The claimant's response was that they were members of his team and could give evidence about his performance. The witnesses were his colleagues and not his managers and the tribunal reminded the claimant to consider the weight that the tribunal could give to their evidence if their role did not involve assessing his performance.

13. The tribunal panel took a break to do decide how to proceed.

14. The respondent's application for postponement was rejected for the following reasons:

    14.1. the claimant did not comply with Tribunal orders relating to preparation of the bundle and witness statements until shortly before the hearing. This is most regrettable;

    14.2. On 2 Sept the respondent wrote to the tribunal requesting strike out of the claimant's claim on the basis of non-compliance;

    14.3. On 5 Sept 2022 the claimant objected to the application;

    14.4. On 8 Sept 2022 the application for strike out was refused. Various orders were made by Judge Tobin which included:

        14.4.1. The respondent's bundle of 10 August 2022 should be used;

        14.4.2. The claimant may prepare a separate folder of documents and bring them to the hearing;

        14.4.3. Witness orders were not made;

        14.4.4. The claimant was to disclose his witness statement by 5pm on 12 September 2022.

    14.5. The claimant did comply with the orders and he did disclose all the witness statements on which he relied which included those of 5 witnesses and himself on 12 Sept 2022. He also prepared a 275 page bundle and sent this to the respondent on 12 Sept 2022.

    14.6. We reviewed the witness statements relied on by the claimant and we consider that they are largely background, particularly those of Mr

Thomas, Mrs Ajayi and Mrs Maha Abbas. We considered that any cross examination of them should be short due to the background nature, at best of the evidence. The claimant should carefully consider how much weight the tribunal will give this evidence about performance when it comes from those who were not responsible for assessing his performance. In relation to Mrs Moore and Mr Igwe, it had already been made clear that the Tribunal will not allow a mini hearing to take place about what happened during these employees employment. It maybe that facts could be agreed such as that they were dismissed before 2 years service was completed and a truncated process was followed, they were barred from email communications, etc. It is possible that there is little really disagreement about the relevant facts. The parties are reminded that it is for the Tribunal to make the decision about the law.

14.7. Further, the respondent has been aware since October 2021, following receipt of the amended claim to which it responded, that the claimant's claim included issues about the process or lack thereof of his dismissal. In summary, we do not consider that these witness statements raise substantial new evidence;

14.8. the witness statements themselves are reasonably short. Two witness statements are less than two A4 pages and only have eight paragraphs. The other three witness statements are only marginally longer. The witness statement of the claimant and of Mr Haider (for the respondent) are also all at relatively short;

14.9. Fundamentally, the respondent was aware of all this new documentation on 12 September 2022 which was 5 working days before today. We were informed that Mr Haider of the respondent had 2 full working days and one day's annual leave before he could speak to Counsel on Thursday, 15 September 2022. The fact remains that there were 5 workings days to address the new material. There are often substantive matters that need to be dealt with urgently before the hearing commences and, though the short timeframe is regrettable, it is not unusual and in the circumstances has is not unduly prejudiced the respondent. It cannot be said that they have not had sufficient time to prepare their case;

14.10. we do not accept that the respondent has been prejudiced such that it has not been able to prepare the case fairly. It had five working days, it had notice in large part of the issues already and the witness statements in particular are of limited length. The tribunal also noted that it was questionable how relevant the claimant's supplementary bundle was and that approximately 90 of the 275 pages were text or chat messages.

15. The tribunal decided to break for the day at this point which was at 12:19 on day one and reserve judgement so that 2 full days were available for the witness evidence and submissions. This would allow 0.5 day for the claimant and Mr Haider, 0.5 day for the other witnesses which we consider a reasonable time given the nature of their evidence as addressed above and 1 to 2 hours for submissions. Breaking the hearing early on the first day gave the respondent extra time to prepare its case.

The Issues

16. The issues to be decided in this case are set out in the case management orders from September 2021. Pursuant to those orders, the claimant and the respondent submitted an amended Grounds of claim in respect of a claim for indirect discrimination. The respondent submitted an amended Grounds of response.

17. In summary the issues are:

1. Unfair dismissal
    a. Was the claimant dismissed?
    b. Was the claimant automatically unfairly dismissed s99 and s104 ERA?
    c. Was the reason or principal reason for the dismissal that the claimant had exercised his parental rights?
    d. The respondent asserts that the reason for dismissal was performance issues.

2. Detriment (ERA s48)
    a. Did the respondent subject to the claimant to a detriment by dismissing him?
    b. If so, was it done on the grounds that he had exercised his parental rights

3. Direct race discrimination
    a. Were the following acts of direct race discrimination:
        i. Dismissal
        ii. Letter of concern
4. The claimant relies on the follow comparators: Jensen Thomas Maha Abbass and a hypothetical comparator

5. Was the treatment because of colour/race?

6. Victimisation:
    a. Did the claimant do the following protected act on 29 June 2020 the claimant enquired whether the letter of concern was racially motivated and subjected to him to discrimination?
    b. The claimant asserts that his dismissal was a detriment.
    c. Was the claimant's dismissal because of the protected act?

7. Indirect discrimination
    a. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:
    Not carrying out full dismissal procedures for those employees with less than 2 years service?

    b. Did the respondent apply the PCP to the claimant?

c. Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, e.g. “none black” or would it have done so?

d. Did the PCP put persons with whom the claimant shares the characteristic, e.g. “black people” at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, e.g. “none black people”?

e. Did the PCP put the claimant at that disadvantage?

f. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

g. The Tribunal will decide in particular:

h. was the PCP an appropriate and reasonably necessary way to achieve those aims;

i. could something less discriminatory have been done instead;

j. how should the needs of the claimant and the respondent be balanced?

Background

18. The claimant was employed by the respondent from 16 September 2019 until his dismissal on 3 July 2020. Initially he was employed as a lecturer and in December 2019 he was appointed as programme coordinator and team leader. The respondent is a private university/college employing approximately 267 employees over four campuses. The claimant worked at the Wembley campus in the health and social care Department. The claimant filed his ET1 on 5 November 2020.

19. In very brief summary the claimant’s claim is that the reasons provided for his dismissal in July 2022 do not withstand scrutiny. After his dismissal he found out that other employees of the respondent had been subject to similar treatment and he considers that this disproportionately affects black people.

20. The respondent’s position is that the claimant was dismissed because of poor performance.

21. At the hearing we heard oral evidence from the claimant, Ms Mooore, Ms Ajayi and Mr Haider.

The Law and the Burden of Proof

<u>Automatic Unfair Dismissal and Detriment</u>

22. The claimant lacks the two years' continuous service required to claim ordinary unfair dismissal. There is no qualifying period to claim automatically unfair dismissal under S.99, but the employee bears the burden of proof in showing that the reason for dismissal was a prescribed reason within the meaning of S.99 and the applicable regulations Smith v Hayle Town Council 1978 ICR 996, CA.

23. The claimant bares the legal burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason, Smith v Hayle Town Council 1978 ICR 996, CA, in the context of automatically unfair dismissal on trade union grounds under (what is now) S.152 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). The Court's reasoning was based on the general principle that a person relying on an exception to statutory provisions must show that the exception applies to him. The same principle has been held to apply where the inadmissible reason for dismissal is asserted to be a protected disclosure (i.e. whistleblowing) under S.103A ERA Ross v Eddie Stobart Ltd EAT 0068/13. It applies to any of the other automatically unfair reasons for dismissal contained in the ERA, including asserting a statutory right (S.104) which is hat the claimant relies on.

24. Lord Denning MR in Smith v Hayle Town Council said that tribunals should weigh the evidence according to "*the proof which it [is] in the power of one side to have produced and in the power of the other side to have contradicted*". This means once an employee has presented some prima facie evidence that he or she was dismissed for the prohibited reason, it is up to the employer to produce evidence to the contrary.

25. The Court of Appeal in Kuzel v Roche Products Limited [2008] EWCA Civ 380, [2008] IRLR 530 followed the approach set out in Smith in the context of a claim under ERA 1996 s 103A (dismissal on the ground that the employee has made a protected disclosure). The Court of Appeal approved the following analysis of the proper approach to the burden of proof in such a claim:

    (1) Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason?

    (2) If so, has the employer proved his reason for dismissal?

    (3) If not, has the employer disproved the section 103A reason advanced by the Claimant?

    (4) If not, dismissal is for the s 103A reason.

26. In Qua v John Ford Morrison 2003 ICR 482, EAT, the Appeal Tribunal held that an employment tribunal should ask itself four questions in order to determine whether an employee has been automatically unfairly dismissed for taking time off for dependents.

(1) Did the employee take time off or seek to take time off from work during his
(2) If the answer to question 1 is 'yes', on each of those occasions did the employee:
(a) as soon as reasonably practicable inform the employer of the reason for the absence, and
(b) tell the employer how long he or she expected to be absent?
If not, were the circumstances such that the employee could not inform the employer of the reason until after he or she had returned to work?
If the tribunal finds that the employee did not comply with these notice requirements in S.57A(2), the right to take time off work under subsection (1) does not apply. The absences would then be unauthorised and the dismissal would not be automatically unfair.
(3)If the employee did comply with the above requirements, then the following questions arise:
(a) did the employee take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paras (a) to (e) of S.57A(1), and
(b) if so, was the amount of time off taken or sought to be taken reasonable in the circumstances?
(4) If the employee satisfies both elements of question 3, was the reason or principal reason for his or her dismissal that he or she had taken or sought to take that time off work?
If the answer to the final question is yes, the claim succeeds.

Discrimination

5. S13 of the Equality 2010 sets out the test for Direct Discrimination:

"(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.

(5)If the protected characteristic is race, less favourable treatment includes segregating B from others…"

6. S19 of the Equality 2010 sets out the test for Indirect Discrimination:

(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a)A applies, or would apply, it to persons with whom B does not share the characteristic,

(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

(3)The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *marriage and civil partnership;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

7. S.23 of the Equality Act 2010 sets out the law relating to comparators:

"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

8. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that "*the comparator required for the purpose of the statutory definition of the discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class.*"

Burden of Proof for discrimination

9. S136 of the Equality Act 2010 sets out the burden of proof which applies to discrimination issues:

"(1) This section applies to any proceedings relating to a contravention of this Act.

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

10. In Igen Ltd v Wong the Court of Appeal approved the guidance given in Barton v Investec Securities Ltd [2003] IRLR 332 concerning the burden of proof in discrimination cases which is that:

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail….

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive."

11. In Madarassy v Nomura International plc 2007 ICR 867, CA Lord Justice Mummery stated:

"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."

Findings

General findings about the Evidence

27. We found that the claimant was over confident in his evidence, he exaggerated

some parts and made statements about matters which were not in his knowledge. He did not concede when he was obviously wrong, for example he maintained that the email of 29 June 2020 raised an allegation of discrimination when it could not have possibly been interpreted this way and his evidence was vague. This meant that the Tribunal did not find the claimant credible in parts of his evidence.

28. The respondent only provided one witness and he stated that he was not able to give evidence on all material matters. The respondent did not seek to provide other witnesses and we do not consider that this was due to the issues relating to the adjournment request rather than a choice by the respondent about how they prepared their case. Further, in some parts of his evidence the Tribunal found that he exaggerated his evidence and was not credible at times.

Direct Discrimination

29. In relation to the comparators, we find that the named comparators are not comparable. On the appellant's own case there were no allegations of poor performance against Ms Abbas. Mr Thomas is not a comparator because we have found that he did not receive a letter of concern because he completed the survey which the claimant did not and he did not have allegations made against him by Ms Ladha about his performance. We accept that there was one issue about his non-attendance but we do not consider that this was comparable to the appellant's situation as it was not over the same period of time. Therefore, we have considered a hypothetical comparator.

30. The respondent asserts that the reason for the claimant's dismissal was performance. In oral evidence Mr Haider placed reliance on the email of 3 June 2020 to him from Jade Ladha which identified a substantial number of bullet points raising concerns about the claimant and his performance. Amongst other things, Ms Ladha's email accuses the appellant of demeaning and bullying behaviour in relation to copying an email about a staff member to the whole department and that he has a history of such behaviour.

31. The claimant's position in relation to Jade Ladha's email was that she manufactured its contents and it was not an accurate reflection of the situation. He was also not made aware of this letter until he made DSAR long after the end of his employment.

32. The dismissal letter referred to performance issues in the form of unauthorised absences on 4 and 6 December 2019 and 23 hour change requests which showed that he failed to follow management instructions to clock in on time.

33. There is supporting documentary evidence in the bundle for most of the points Jade Ladha raises in her email. We recognise that the bundle did not contain copies of all of the screenshots attached to that email which is most regrettable. However, there was supporting evidence for the claimant's communications to the entire team about staff members/matters after he had been told not to do this, in relation to a student raising concerns about lack of support and emails from Ms Ladha to the claimant chasing compliance with various tasks.

34. We do not find that the claimant can establish that this email was motivated in

any way by race rather than a reflection of some facts and Ms Ladha's interpretation of them. We recognise that the claimant disagreed with Ms Ladha but we find there is sufficient evidence to support her claims such that the appellant cannot discharge the prima facie burden of proof to establish that Ms Ladha's email and criticisims of him were connected with race. A number of the claimant's witnesses sought to provide evidence about the claimant's performance and how good it was. We have placed weight on this evidence because none of the witnesses were in management positions and therefore they were not in a position to assess the appellant's performance from a management perspective. As colleagues they may have felt he was a good performer but that does not mean that they were assessing him against the requirements that management would. It is not unusual for the requirements of what management values do differ from what colleagues value.

35. Further, one of the claimant's witnesses stated that Ms Ladha considered the claimant a threat to her position and wanted to neutralise him. If this was correct, and it is further evidence of the lack of connection between her conduct and the claimant's race.

36. We find that a manager such as Mr Haider, on receipt of the email from Ms Ladha, would reasonably have taken action against the claimant. The claimant was on a 12 month employment contract which was due to end on 15 September 2020 and the respondent was aware of this. Further by June/July 2020 the claimant had only been employed for 9 to 10 months: he had a short employment history and a number of issues had been raised about him by his manager. This is not an unfair dismissal case and the claimant has to discharge the prima facie burden of proof. In relation to this aspect of the claim we find that there is no connection in any way with the conduct complained about and the claimant's race.

37. Another part of the respondent's argument that the claimant was dismissed for poor performance is that he was issued with a letter of concern for failing to complete a survey which he was required to do so. It is not disputed that the claimant did not complete the survey, was chased to complete it and was issued with a letter of concern.

38. We do not accept the claimant's assertion that the letter of concern was targeted at black employees. The claimant provided some information about the letter being sent to black employees but not all employees. However, the respondent's evidence was that the letter was sent to a greater number of employees than those identified by the claimant. The claimant's own evidence, which we accept, was that some Asian employees and one white employee had been sent the letter of concern.

39. Mr Haider provided evidence that the letter was not sent to Mr Thomas who was Asian because he had completed the survey and Mrs Abbas who was Asian because she was on maternity leave at the time. Despite both these individuals giving witness evidence they did not deal with these matters. We accepted Mr Haider's evidence because it was not disputed by witnesses in their witness statements.

40. We find that the claimant cannot establish that sending the letter was connected

to race in anyway or was targeting black employees. His own evidence does not support this claim. He cannot discharge the prima facie burden of proof in respect of this issue.

41. The respondent relied on the claimant's absences and not reporting them correctly as part of his performance issues. Mr Haider said that the respondent took into account absences from January 2020 to June 2020.

42. Before January 2020 the claimant reported his lateness on the whatsapp chat which included Jade Ladha who the claimant stated he thought was his line manager with Mr Haider. There was no evidence from the Respondent that it had been communicated to the claimant that only Mr Haider was the claimant's line manager except Mr Haider's evidence. As Ms Ladha was the course leader and the claimant had not been provided with a new contract which set out that Mr Haider was his line manger, we find that it was reasonable for the claimant to assume that reporting absences to Ms Ladha was appropriate. Particularly in light of her whatsapp message in Jan 2020 to a new joiner on the chat, which was visible to all members of the chat including the claimant, stating that lateness was to be recorded on the whatsapp chat so that classes could be covered. In January, 2020 the claimant received emails from HR raising concerns that they had not been informed about his lateness and thereafter the claimant changed his behaviour and informed Mr Haider and HR about his absence before he attended the work place.

43. In these circumstances we cannot accept that there was a substantial failure to report lateness correctly. However, we also accept that the claimant was substantially late on repeated occasions during a short period of time for example 4 times between the end of January 2020 and mid-March 2020. This is something that an employer could legitimately be concerned about in an employee with a relatively short employment history.

44. The respondent also identified unauthorised absences on 3 December 2019 and 23 March 2020. The claimant had made some contact with the respondent about 3 December 2019 and being late on that day. The absence on 23 March 2020 resulted from school closures due to the national lockdown. We therefore considered that the 23 March 2020 was an absence that no employer could reasonably take action about. Despite his oral evidence that only absences between January and June 2020 were considered, Mr Haider's witness statement referred to the absence on 3 December 2019. We therefore consider that the respondent did take this into account. The claimant does not dispute he was late on this day. His view was that this absence resulted from him having to stay late the night before which created issues with his childcare. Even accepting the claimant's case, this is an issue which it is open to an employer to be concerned about and in combination with other situations consider performance related.

45. The respondent referred to 23 hour change requests as part of the claimant's poor performance. The claimant asserted that most of these were due to problems with Calamari, the time recording system. This was disputed by the respondent who asserted that there were no issues with Calamari.

46. We prefer the claimant's evidence on this matter. The claimant gave a detailed and coherent account about the repeated problems with Calamari. His account was supported by his other witnesses. Further, the respondent sent an email shortly before payroll cut off reminding employees to ensure that any errors had been corrected. We consider that the respondent would not have repeatedly sent that sort of email if there were not systematic issues with the reporting through Calamari.

47. To summarise the situation relating to absences, we do not consider that criticism of the appellant's reporting would be fair in an unfair dismissal situation. However, this is not an unfair dismissal case, it is a race discrimination case. We find that the respondent has at best placed an unduly negative interpretation on the issues about the claimant's unauthorised absences and that the complaints about Calamari are a systematic issue unconnected with the claimant. In the wider context of the allegations against the claimant and the object of support for them, we do not consider that a harsh interpretation of the claimant's absence reporting can discharge the prima facie burden of proof.

48. Fundamentally, the claimant says that if all these allegations had been made against him as a person who was not black, no action would have been taken against him. Given the findings above, we must consider whether the claimant has discharged the prima facie burden of proof. When the wider context of all the allegations is considered we find that there is not something more on which we could conclude, on the balance of probabilities, that the respondent's actions were in anyway connected to race. We consider that the claimant also disagrees with how the respondent has interpreted the factual situation. This is insufficient to discharge the prima facie burden of proof.

49. As setout above we have found objective support in the documentary evidence for the respondent's position. Therefore, we do not accept that the allegations themselves were somehow manufactured.

50. We have considered on what else the claimant could rely to discharge the prima facie burden of proof. It could be said that the claimant relied on the evidence of Ms Moore, a black women, being dismissed in similarly cursory manner around July 2020 after less than 12 months service and at the end of term when there were no longer any classes to attend, Ms Ajayi who also said that she was expecting to be dismissed at a 6 month probation review and so resigned pre-emptively and Mr Igwe who was dismissed in similar circumstances. Ms Moore's evidence about the reasons for her dismissal were confusing. Despite some statements to the contrary she also stated that she was dismissed without reasons in a telephone call on 3 July 2020 which was after classes had finished for the year. She found out more reasons later which included some concerns about performance. Her complaints were that an investigation had not been carried out into the accusations against her. Ms Moore stated that she and a white Eastern European colleague were the only ones dismissed this way and after such short service at her campus (which was Birmingham and not Wembley where the claimant worked and for which Mr Haider did not have responsibility). We find that the fact that a non-black employee was treated in the same way as Ms Moore lends support to a finding that this is how the

respondent operated rather than actions against black employees.

51. In relation to Ms Ajayi her evidence was that she resigned prior to a probation review meeting and because her values and the respondents did not align and she had concerns about what might happen at the meeting. We find Ms Ajayi's situation not to be comparable to the claimant's and as what would have happened to her is speculation.

52. In relation to Mr Igwe, the respondent accepted that he had been dismissed in an abbreviated dismissal process similar to the claimant.

53. Even taking the claimant's dismissal, Ms Moore's and Mr Igwe's dismissals together we find that is not enough to discharge the prima facie burden of proof in the circumstances.

54. However, if we were wrong and the claimant had discharged the prima facie burden of proof, we would have found that the respondent had discharged the burden of proof which lay on it as a result of the email of Ms Ladha, the supporting documentation and the issuance of the letter of concern. We do not find in all the circumstances are considered that the claimant's dismissal was in any way connected to his race.

55. The claimant also made some vague allegations about Asian employees. There were reference to Mr Zulkiffle who is Asian and two other Asian employees who were involved in a fight and Mrs Abbas (who went on maternity leave and therefore provides no basis for comparison). In relation to the two other Asain employees, the respondent provided written evidence that one of these individuals was a contractor and not an employee which we accept. We do not find this comparison helpful because the circumstances were very different. The two other individuals were accused of fighting which is not comparable to the allegations against the claimant.

56. Even taking the claimant's claim at its highest that Mr Zulkiffle was a poor performer and that the two other individuals, (only one of which was an employee) where treated in the way that the claimant describes (which is that the employee was given a written warning and a letter of concern was sent to the contractor), they are too different to the claimant's situation to be of assistance to his claim. We have dealt with Mrs Abbas above.

57. For these reasons, we dismiss the claimant's direct race discrimination claim.

Indirect Discrimination

58. The PCP relied on by the claimant is not carrying out full dismissal procedures for those employees with less than 2 years service.

59. In evidence, Mr Haider accepted that this was generally the case in relation to performance but not in relation to misconduct. We therefore find that there was a PCP as identified.

60. We find that the claimant has not established that the PCP puts black people at a disadvantage. Though the claimant had witnesses such as Ms Moore and

Mr Igwe who were black, had less than 2 years service and were dismissed we find that the claimant cannot establish that the PCP has a disproportionate effect on black people.

61. We find that the respondent had sharp employment practices. We accept the evidence that it dismissed lecturers as soon as classes ended in the summer even though the lecturers were on 12 month contracts, so their employment would have ended in 2 months or so, in order to save a few weeks' pay and this was very harsh. It used employees and discarded them when it was convenient to the respondent.

62. However, we consider that the PCP was applied to most employees of whatever race. Ms Moore stated that she and a white Eastern European colleague were the only ones dismissed this way and after such short service at her campus. This does not demonstrate that the PCP had a disproportionate effect on black people Though the claimant provided some statistics about the number of black lecturers this information is not relevant to the issue we have to decide. There is no evidence to establish that this PCP affects black people more than any other people and therefore his claim must fail. We do not consider that we can make inferences in the circumstances of this case.

63. For these reasons, we dismiss the claimant's indirect race discrimination claim.

Automatically unfair dismissal

64. One of the requirements of a successful claim under s 57A of the ERA is that the reasons or principle reason for the dismissal was that the claimant had taken or sought to take time off for dependents. Even assuming that all the other requirements of S57A are made out (which is taking the claimant's case at its highest) we do not find that the reason or principle reason for dismissal was the time off (which includes lateness). This is because:

    64.1. we find that the respondent's reasons about performance issues raised by Ms Ladha and not completing a compulsory survey resulting in the issue of a letter of concern are made out objectively. Whilst we have found that the respondent's claim that the claimant breached reasonable instructions in relation to absence reporting cannot be maintained, we have also found that the claimant did have a number of absences including lateness, even on the basis that these did qualify as absences under section 57A ERA, we are not satisfied that they were the reason or principle reason for dismissal, this is because the other reason in particular those raised by Ms Ladha are detailed and sufficiently serious reasons to take action against the claimant;

    64.2. we recognise that the performance issues raised by Ms Ladha were not identified in the claimant's dismissal letter. The claimant raised this a number of times in proceedings and he did not understand how the respondent could rely on reasons different to those set out in his dismissal letter. I stated that it is open to a respondent in Employment Tribunal proceedings to rely on different or additional reasons to that set out at the time of dismissal because, for example, there is a difference in how facts

can be legally classified. We find that the email sent by Ms Ladha sets out a substantial number of allegations against the claimant that are serious, she was in a position senior to the claimant which enabled her to make comments on the matters that she did and the email was sent in advance of the dismissal meeting in respect of the claimant directly to Mr Haider who made the decision to dismiss the claimant; and

64.3. we consider that the respondent used employees when they were useful to it and discarded them when it suited them and that this was not related to the claimant's race or his absences relating to childcare. We found that the claimant is an individual who had a very high opinion of himself and liked to do things his own way rather than meekly follow instructions. This was not compatible with the respondent's preferences.

64.4. We find that the claimant's claim for automatic unfair dismissal under the ERA must fail.

Detriment section 47C/57A ERA

65. The claimant has not identified the detriment on which he relies except for his dismissal. We cannot identify a detriment beyond the dismissal and we have dealt with that claim above.

66. Therefore, the claimant's claim to have suffered detriment as a result of taking leave under section 57A fails.

Conclusions

67. The Claimant's claims for automatically unfair dismissal are dismissed.

68. The Claimant's claims for direct race discrimination (s13 Equality Act 2010) are dismissed.

69. The Claimant's claims for indirect race discrimination (s19 Equality Act 2010) are dismissed.

70. The Claimant's claims to have suffered a detriment under s47C ERA relating to dependent's leave are dismissed.

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Employment Judge Bartlett

Date: 17 November 2022

JUDGMENT SENT TO THE PARTIES ON

22 November 2022

FOR THE TRIBUNAL OFFICE

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