EMPLOYMENT TRIBUNALS

Claimant 1: Mr S Kahsay

Claimant 2: Mr Y Tesfamariam

Claiamnt3: Mr R Araya

Respondent: Greggs PLC

Heard at: **Newcastle**
On: 26th, 27th, 28th, 29th 30th September 2022; 3rd, 4th October 2022.
24th, 25th January 2023
26th, 27th January 2023, In Chambers
30th January 2023 Judgment

Before: Employment Judge AE Pitt
Mr S Moules
Ms K Newman

Representation
Claimants: In person with assistance of interpreters
Respondent: Mr S Liberadzki, of Counsel

JUDGMENT having been sent to the parties on 6th February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim by three former employees of the respondent. They were all employed as Production Operatives in the Hygiene Department. The claimants make claims for race discrimination and unfair dismissal. The respondent is a retail bakery operating throughout the UK.

2. The Tribunal had before it a bundle of documents which included various policy documents; documents relating to disciplinary hearings in relation to other employees; screenshots taken from videos.

3. The claimants are all from Eritrea and although have some English they were assisted by interpreters throughout the hearing.

4. The tribunal read witness statement heard from the following witnesses: Simon Long, Head of manufacturing; Craig Dixon Production Manager; John Murphy, Site Manufacturing Manager; Keith Carreer, Site Services Team Leader; in addition, all the claimants had prepared short witness statements. They all gave evidence and confirmed that the additional information they had provided to the Tribunal, in the bundle for: Claimant 1 at pages 51-53, 57-60, 61-64, 71-75; for claimant 2 at pages 112-113, 127-128; for claimant 3, at pages 176,180-183.

5. The claimants had in addition produced witness statements from a number of others who were or had been employed by the respondent at the Balliol site. The claimants wished to have the witness statements of these people admitted as evidence, the respondents objected. Having heard submissions from both parties and reviewed the witness statements the tribunal concluded that because of the generic nature of the contents of the statements and specifically the lack of detail in relation to the issues before it this application was refused. Save for one statement by Mr Emmanuel Miller, usually known as Koffi who was present at some of the events which were under in dispute.

6. The following persons are referred to in the reasons Tony Jones, Team Leader Balliol 1; Keith Carreer, Team Leader Balliol 2; Joanne Howe, Site Service Supervisor; Craig Dixon, Production Manager, Investigation Manager; John Murphy, Disciplinary Manager and Dismissing Officer; Stuart Nicholson Supply Chain Operators Manager, Appeal 1; Simon Long, Head of Manufacturing, Appeal 2; Pauline Blacklin People Supply Assistant; Emma Bass, Site Services Manager Andrea walker; Clare Stewart, People Manager People Manager; Edwina Lugg Occupational Health Advisor.

Facts

7. In reaching our conclusions on the facts, the Tribunal took account of the witness statements referred to above, the evidence of each witness and the documents to which we were referred. We have applied the balance of probabilities test where necessary to determine any disputed facts.

8. The respondent is a specialist retail bakery with outlets across the UK. The claimants worked at its manufacturing plant in Balliol as Production Operatives in the hygiene department. The claimants are all from Eritrea. They all have some English, but their first language is Tigrinya. Their role was to clean the manufacturing plant when it was not operational, usually at the weekend.

9. In order to do this, they are required to wear PPE which includes boots, overalls, hat. This clothing must be put on before entering the production area and removed whenever an employee leaves the production area. Locker rooms are available to store personal items. An employee is not allowed to take anything into the manufacturing area. Social distancing was being practiced at this time. The respondent had in place a one-way system for entry and exit to the premises. In addition, the locker room had been split and lockers moved to ensure social distancing was maintained.

10. The respondent operates an electronic system for employees to use to record the hours worked. Each employee is given an electronic card which they must use to clock their arrival at work each day. Employees must clock out if going on a break and at the end of each day.

11. In order to use the lavatory and employee must leave the production area disrobe, use the facility, return to the locker room and put on their PPE before returning to the production floor. The respondent does not have any policy in relation to the use of the lavatory whilst at work, that is to say there is no time limit, nor are the employees limited as to the number of times they may use the facilities during the day. They are not required to clock in and out when using the lavatory. In the evidence we heard the respondent accepted that it could take an employee some time for such a break. In one case, the respondent accepted that it took take up to 20 minutes for this process. Employees are not required to clock off before using the facilities.

12. The respondent has a comprehensive employee handbook which indicates that gross misconduct may include, leaving your place of work without permission; not clocking off when required and leaving your place of work; falsification of records including attendance records. It should be noted here, that where the claimants are accused of falsifying their working hours, which was part of the stated reason for their dismissal, the respondent's case is not that they had physically adjusted any computers or electronic system, rather that by leaving the production area for an extended period, which was not for a legitimate purpose the claimants had in effect falsified their working hours.

13. The Disciplinary Policy as a first step for an initial or minor breach would normally be dealt with informally through Counselling. If this occurs a Counselling Form should be completed to record the discussions. requires an investigation before any disciplinary action can be taken (237). This might include discussions, interviews with the individual or witnesses to the incident.

14. During an investigation the individual being questioned has a right to be accompanied. If an employee is dismissed, they have a right to two appeals. The first is full hearing the second is dealt with on paper.

15. In April 2019 claimants 1 and 3 along with other employees brought a collective grievance in relation to race discrimination. This is the protected act upon which claimant 1 relies. The respondent accepts that is a protected act for the purposes of this claim.

16. Although in the pleadings there is reference to ongoing victimisation and harassment, claimant 1 does not pursue those as claims and says these are referred to as background only.

17. The Balliol site is in fact two separate buildings. At the time of these events, June 2021, although cameras had been installed outside the buildings the necessary software had not been activated so in effect these were 'dummy' cameras. There was a substantial delay in the activation of the cameras because of the Covid pandemic. The claimants did raise the question of these cameras at their hearings but were not informed of this position. They were simply told that the respondent was not suggesting that the claimants had gone out to their car.

18. On 9th September 2019 claimant 1 was suspended for using aggressive behaviour. A disciplinary procedure was followed in relation to two separate dates. As a result, claimant 1 was issued with a Written Warning by Michael Robson. The warning was valid for 6 months.

19. Claimant 1 was also subjected to disciplinary action for failure to follow the procedure for washing hands. The investigation was carried out by Craig Dixon. On 2nd June 202 claimant 1 was issued with a Final Written Warning for this misconduct. Claimant 1 appealed this decision. The appeal was dismissed. Following this claimant 1 raised an issue concerning Craig Dixon's investigation with Claire Stewart, of the People Department, who agreed that Mr Dixon would not be involved in any other matter investigating claimant 1. Claimant 1 raised this prior to the investigation in this case, this was confirmed by Ms Blacklin at the commencement of his investigation meeting however she stated that Mr Dixon was still able to conduct the

investigation because he was independent of his last investigation and he is not the disciplining manager.

20. On 12th February 2021 claimant 1 was issued with a warning for unsatisfactory attendance. At this meeting claimant 1 specifically raised the issue of victimisation and that he was stressed as a result.

21. On 18th April 2021 claimants 2 and 3 were discovered in the locker area using their phones. According to the electronic system the two were 'clocked in" and therefore should have been on the production floor working. They were discovered by Keith Carreer who told them to go back to work. It does not appear they were confronted about their behaviour.

22. Around this time and because of the behaviour of claimants 2 and 3, Joanne Howe convened a 'huddle', briefing on the shop floor. There was some confusion as to the date of the 'huddle' from the respondents witnesses but the Tribunal concluded having viewed an email of 19th April 2021 that it was 18th April 2021. Mr Dixon appeared to believe at the time of the investigation that the 'huddle' was 4 or 5 weeks ago but later he states it was only 2 weeks previous to the 5th of June. In the email Ms Howe states that she told the employees that the behaviour was unacceptable, and it will treated as gross misconduct and cameras will be checked. Claimant 1 was not present for this briefing as he was absent from work. Despite the wording of the email the Tribunal is not satisfied that she said gross misconduct, but words to the effect that disciplinary action would be taken.

23. No disciplinary action was taken against claimant 2 or 3. This was as a result of an email Ms Stewart from People Services stating: 'How sure are you that these are the only two people in the team that have been having extra breaks in the changing room? I would be very concerned about the consistency of this, and action taken. The ones we have formally investigated and actioned have been very clear whereby someone is having been having extra cigarette breaks.'

24. All three claimants appear to be friends, they regularly take breaks together. They are entitled to 90 minutes for breaks across a shift on Saturday and Sunday. It is alleged by the respondent that claimant 1 took two breaks on 5th June 2021 totaling 85 minutes; authorised breaks between 11:36 - 1152 and 13:37 – 14:46. He was also absent between 17:27 – 17:38 from the production floor although he was clocked in.

25. On the same day Employee F, one of the comparators, left the production floor at 16:52 returned at 17:12 for a toilet break.

26. On 6th June 2021 all three claimants had a break between 11:17 and 12:03 . They left the site together and went to nearby Greggs outlet for some food and returned together. Having dressed in their PPE they all clock on and are seen on CCTV to leave the Production floor. Claimant 1 returns at 12:35, Claimant 2 at 12:36, claimant 3 at 12:39. Later in the day all three took a further break when they clocked out.

27. Whilst they were absent, following their break, Ms Howe looked for them to carry out a specific task in the de-tinning room. When she was unable to locate them, she enlisted Tony Jones to assist in searching for them. The Tribunal concluded that it is unlikely Tony Jones properly checked the toilets as this would require him to remove his own PPE, and therefore it is more likely he made at most a cursory check from the door. Despite Ms Howes evidence that Mr Jones had told her that he walked through the tribunal does not accept that. They both searched around the locker rooms. We have the screenshot of the video showing the time the claimants clocked in and then arrived back in the production area. It is clear that Ms Howe was waiting for all three to return, she did not confront them but made a note of the times and commenced an investigation. This involved her emailing People Services requesting the CCTV footage be checked.

28. The claimants had a further authorised break and being unbale to find Ms Howe, they told Mr Miller they were leaving the site. Whilst compiling a report a fire alarm sounded and the premises had to be evacuated, there was a conversation between Ms Howe and the claimants.

29. As a result of the claimants working pattern they were not informed that they may be subject to disciplinary action until 11th June 2021, the letter of invite to an investigation meeting simply set out that they had taken unscheduled breaks, and falsified their time and attendance and that they had left their place of work without permission. It was clear to the Tribunal that the claimants did not understand the nature of the second allegation concerning falsification of records.

30. Ms Howe sent two emails which are relevant. On June 12th she emailed Emma Bass. In the first email she set out the events of June 6th indicating that Mr Jones had checked ‘the clock’ to see if they claimants were on supposed to be on the Production Floor, why this was necessary is unclear. After this the two went to check the production floor to assign a task in the de-tinning room. Not finding them, further checks were carried out to see if they were in the locker rooms and or other areas inside the building. Being

unable to find them. She then waited for them to come back and assigned the task. She did not confront them about where they had been. In the second email Ms Howe stated it was her belief that the claimants had gone out and sat in the car, but she had no proof of this. The email was 'just in case they say they were all at the toilet as Aman, (Comparator F) had been querying how long they get for toilet breaks.

31. On 19th June 2021 at 7am an Investigation meeting was held with claimant 1, Mr Miller was present as a supporter. Mr Dixon was the investigating manager and Miss Blacklin from People Services was also present. During the meeting the claimant asked what an unauthorised break was. Mr Dixon refers to a statement he has in relation to a briefing given about unauthorised breaks. It was put to the claimant that the T& A system indicated that the claimant had taken 85 minutes in breaks and the CCTV showed he had had another 11 minutes break. At this time the claimant is not shown the footage or screenshot nor is he given any further detail about when it is alleged he took the unauthorised break.

32. Mr Dixon moves onto discuss 6th June. He does give the timings on this occasion. The claimant indicates he wants the CCTV checked and an investigation into whether the T&A has been changed. He is shown CCTV footage of him returning to the floor. The claimant indicates he clocked on and then went to the toilet. Following this it is implied to the claimant that it is unusual for someone to go for a break, clock back in and then go for a toilet break. The claimant raises the issue of having bowel syndrome. Mr Dixon moves on to the allegation of leaving site without permission, The claimant raises the issue of different treatment for people from different backgrounds. Having confirmed it was race that was the difference, Mr Dixon indicates that if is the case this will need to be investigated.

33. At 9am there was an Investigation meeting with claimant 3. The same people were present. The claimant accepted he had been at the briefing with Ms Howe. In relation to the allegation of being away from the floor for 33 minutes, he said he had gone to the toilet, he added that he may have been constipated. He was shown the footage of him returning to the T &A machine. Mr Dixon then moves on to the allegation of leaving the site. The claimant tells Mr Dixon they had informed Koffi.

34. Claimant 2 was interviewed the same day at 10am. Mr Miller did not accompany this claimant to this investigation meeting. The respondent asserted that this was because Mr Miller did not want to represent any more colleagues that day. Having heard from Mr Miller and Mr Murphy, Mr Dixon

and Mr Carreer, the Tribunal rejected this assertion. We are satisfied that Mr Miller had indicated to all three claimants, at the commencement of the shift, he would be present for the investigatory meetings. Following Claimant 3's meeting which ended at 9:48 am, Mr Miller left the office and returned to the production floor. He was not called to attend a further meeting. Although the claimant did not object to Mr Newton who was asked to represent him the tribunal is concerned that the respondent denied the claimant his person of choice who was available. There was clear evidence that later claimant 2 confronted Mr Miller on the production floor and he, the claimant, was very upset.

35. Also interviewed that day at 11:15 am was Comparator F. Mr Edwards was present for his interview. The allegation of an unauthorised break was put to him and he said he had been constipated that day. The time it took was also because of having take off and put on his PPE. At the end of the notes there is a comment that he will be sent a disciplinary invite. In evidence Mr Dixon told us this was an error. The Tribunal do not accept that Mr Dixon made the decision not to go to discipline straightaway, rather he made the decision later. Mr Dixon made further enquiry as to whether this employee could work on the production floor whilst constipated.

36. Jumping to September, as a result of the claimants' comments to Simon Long, about others not being dismissed. Mr Dixon was asked for his rationale for not taking Comparator F to discipline. Mr Dixon replied that Fs absence was not an extension of a break period, and he believed it was a genuine need to use the facilities. The absence was not excessive considering he had to get disrobed in the changing room on the opposite side of the corridor; his absence was an isolated incident and did not appear to be a trend.

37. Mr Dixon had informed all three claimants he would consider the interviews and let them know when the investigation was concluded.

38. On 27th June Mr Dixon emailed Ms Howe at 6:44am. It appears he was aware prior to this that the claimants were unhappy about how he was managing the investigation. He asked Ms Howe to speak to all the claimants regarding their allegations of race discrimination as he had heard nothing further from them. She was told to speak to them 1-2-1 and ask if they wanted to report the matter formally. She was specifically told not to take statements or get into conversation but to tell the guys they can report through her.

39. Ms Howe did speak to the claimants, and Comparator F on 27th June 2021; the claimants indicated they wished to proceed, Comparator F did not. They were all concerned that they had not heard about the disciplinary.

40. It is clear that there were some communications between Mr Dixon and Ms Howe following the initial email. At 9:35am Ms Howe emailed Mr Dixon to inform him that there was an issue with all 3 claimants regarding the disciplinary. She told him they were not happy with the way in which he was managing the investigation and their allegations of racial abuse 'they have all agreed to go ahead with the allegation [of race discrimination]'

41. As a result of that email Mr Dixon, who was not on shift, went to the site. The tribunal is satisfied that for Mr Dixon to do that he was probably at least frustrated by the comments and most likely angry for having to lose his free time to deal with it.

42. Having arrived at the site he bumped into Mr Carreer in the corridor making tea in the kitchen, he asked him to accompany him. The Tribunal does not accept that he spoke to the claimants first and they requested Mr Carreer be present.

43. Having seen the demeanor of Mr Dixon in the witness box, the inconsistencies noted above, and despite the evidence of Mr Carreer, we do not accept Mr Dixons account of the meeting that followed. Having decided to come onto the site on his day to resolve an issue which involved him personally we do not accept that he was as calm as he tried to portray before us. The Tribunal concluded that he was extremely unhappy and upon entering the office he threw his face mask on the desk and spoke to the claimants in an aggressive and intimidating manner pointing his finger saying, 'if you take this further you will be in big trouble'.

44. The following day Mr Dixon sent an email outlining his account of the previous day's meeting to Mr Carreer copying in Ms Blacklin, a Mr Walker and Mr Murphy and asked Mr Career to confirm the contents were accurate. The tribunal query why Mr Dixon felt the need for that to happen if there was nothing untoward in the meeting. Also, a more appropriate way to do this would be to ask Mr Career for his own account. The tribunal accordingly doubted the events as recounted by Dixon and Career.

45. The investigation into the Falsification of T&A consisted of Mr Dixon looking at the relevant part CCTV footage, considering the emails of Ms Howe on

6th June,. He did not speak to Mr Jones, nor did he commence an investigation into allegations of race discrimination. Specifically, he did not ask Ms Howe to take formal statements from the claimants about this but that they could report any issues to her formally.

46. All three claimants were invited to separate disciplinary hearings on 3rd July by letter 29th June 2021. Claimant 2's hearing was rescheduled and heard on 6th July 2021. Present at the hearings were Mr Murphy, the Disciplinary Hearing Manager, Ms Blacklin from People Services; Chris Edwards was a companion for claimant 1; Mr Gebrekristos was a companion/translator for claimant 3. Mr Emias was a translator for claimant 2, he also had a representative from Unite present the conclusion of each hearing Mr Murphy adjourned and then announced his decision. They were all given a right of appeal.

47. At his disciplinary Claimant 1 raised the fact that he has 'bowel syndrome' and this could be confirmed by his GP. Mr Murphy indicated that that evidence should have been produced. In addition, he said he has been suffering from stress for the past two years. Mr Murphy, clearly, did not believe the claimant stating, 'I don't believe you, there were three of you that all did the same thing at the same time and people have said you weren't there.'

48. Claimant 3 told the hearing he did not know where he was for the time he was absent from the production floor. The claimant was also questioned about the previous incident where he had been found in the locker room with claimant 3.

49. Claimant 2 was asked about the three allegations. In relation to the unauthorised absence, he said there was a misinterpretation of the word 'pee' and it should have been 'poo' which is why he was absent for 33 minutes. The question of a translator was raised formally by Mr Cuggy. Mr Murphy stated 'why I have doubts is that you and your two colleagues, who go on break together, all had your break together, came back together and went off the floor together for the same length of time. Mr Cuggy also raised the fact that he hadn't seen the witness statement which Mr Murphy was referring to, i.e. the disciplinary notes of the other claimants. Mr Murphy said he is not using their statements and later on ' I have three disciplinaries all saying the same thing for the same time'.

50. The decision to dismiss was confirmed by letter to the claimants, Claimant 1 on 6th July. It was lacking in detail simply confirming that the decision was

to summarily dismiss gross misconduct for taking unscheduled breaks and falsifying time and attendance records. Claimant 2's letter was dated 8th July and was very similar in that it confirmed the summary dismissal for gross misconduct for taking unscheduled breaks. The Tribunal notes that throughout the investigation hearings and appeal, the respondent repeatedly uses breaks in the plural when claimants 2 and 3 were only ever alleged to have taken one unscheduled break. The letter to claimant 3 dated 7th July 2021, which again is in similar terms confirming the summary dismissal for taking unscheduled breaks and falsifying your own time and attendance records.

51. All three claimants appealed. Claimant 1 set out 12 grounds which included: Craig Dixon being involved when he had been assured, he would not be; issues surrounding the actual allegation; 'The big issues I want to discuss with you is treatment and different treatment and different judgment between different background people. He had bowel syndrome.

52. Claimant 2 on 26th July set out nine issues. This included victimisation and discrimination because of the colour of his skin; being bullied, targeted and treated differently. He also raised the issue of being sat in the car.

53. Claimant 3 on 19th July 2021. He also raises the issue of race and that it is a conspiracy against him. He also raised that his case had been dealt with collectively and not individually.

54. Each claimant was offered a separate hearing. All Appeals were heard by Mr S Nicholson.

55. Claimant 1 was heard on 16th August 2221. At this hearing the claimant gave Mr Nicholson a letter from his GP which indicated that the claimant had been diagnosed with IBS in 2014. In the past he has been diagnosed with PTSD. It indicated that the claimant had recent a history of stress exacerbating the condition requiring the claimant to need use a lavatory for extended periods. The claimant raised race as an issue.

56. Mr Nicholson discussed the grounds of appeal but found no merit in them and dismissed the appeal.

57. In an outcome letter dated 20th August 2021 he set out his reasons for his decision. In relation to Mr Dixons appointment he noted that no issue had been raised by the claimant about this. In relation to being sat in the car, the response was there was no conclusive evidence he was sitting in the car.

With regard to race, Mr Nicholson stated he 'was comfortable that they have been dealt with consistently and fairly'. In relation to the GP letter, Mr Nicholson dismissed it stating, 'It is my belief this is not a doctor's diagnosis it is a summary of what you have told him I the past.'

58. The second claimants hearing was on 17th August 2021, he was represented by Nr Usher from Unite. His outcome letter is dated 20th August 2021, Mr Nicholson stated he believed a fair and through investigation had been carried out. In relation to discrimination he said, 'I am comfortable that they [the incident] have been dealt with consistently and fairly and the correct sanction were delivered based on the factual information. He accepted there was no conclusive evidence as to where the claimant was during the 32 minutes.

59. Claimant 3 was invited to an appeal hearing on 19th August 2021

60. All three claimants raised a second appeal. At the hearing the points of appeal were discussed. The claimant raised inaccuracies with the notes, which he had raised with Ms Blacklin but had not been forwarded to Mr Nicholson. The claimant specifically raises that john Murphy's' attitude towards black people is not positive'. The decision to dismiss was upheld.

61. In an outcome letter sent on 23rd August 2021 having set out the grounds of appeal Nr Nicholson summarised his findings, unlike the previous claimants as follows,' It is my belief that a full and through investigation has been undertaken into your appeal. After careful consideration of the available video and the discussion points you have raised during our meeting, I confirm that my decision is to uphold the decision to summary dismiss you.'
62. All three claimants elected to go to a second level appeal. These were all dealt with by Mr Long. The respondent policy is that this stage appeal is a paper hearing.

The Comparators

63. The claimants rely on the following comparators:

63.1. Employee A : this was a white male Team Leader who was issued with a Final Written Warning for falsifying his T&A,. The facts which were accepted by the disciplining manager Mr Murphy were; there were a number of issues in production including some meat going out of date; corned beef was delayed. He was panicking. He went outside to speak to Mr

Dixon using his mobile phone as there was no one on site to ask. He went to the 'smoking shelter' had a cigarette and text Mr Dixon. He accepted he should have clocked off but because of his panic he forgot, it was an honest mistake.

63.2. Employee B, a white male who was alleged to have falsified his T&A on two occasions. He was issued with a Final Written Warning. The facts as accepted by the disciplining Manager Mr Murphy's were he had taken two unauthorised breaks which Mr Murphy believed were cigarette breaks, B accepted he was wrong to do so. It was accepted that he was suffering from anxiety and there was lots of stuff going outside of work for B. He had 10 years unblemished with fantastic work ethic. In addition to the Final Written Warning he agreed to speak to the Occupational Health Advisor for support and to contact UNUM to see if there was any counselling support available. service, (pg 501).

63.3. Employee C a white male who was issued with a Final Written Warning because he was unable to carry out his normal duties due to being under the influence of alcohol. The disciplinary manager was Mr Murphy. Again, the facts accepted by the respondent were that C had accepted he was in the wrong; C had taken pain medication on top of alcohol. C had since received support from his GP. In addition to the Final Written Warning C was given an action plan to aid him in his recovery and his return to work. If he did not do so he may have his employment terminated. It was accepted by C that he this had happened Alcohol, sleeping on shift.

63.4. Employee D a white male, who was dismissed for taking unauthorised breaks, 19th,20th,21st August, smoking breaks, He was Dismissed Oct 2020, by Mr Murphy.

63.5. Employee E Didn't swipe when went for a drink of water to take medication, 25/2/20.

63.6. Employee F, is referred to above Amam Haille

63.7. The final two comparators were white female, who are sisters. They were not disciplined. At the time of the claimants' disciplinary they were being investigated. The facts as found by the respondent were they were tasked with cleaning the smoking

shelter and they took advantage of the fact and had cigarettes whilst there.

The Issues

64. The issues were identified by employment Judge Morris at a case management hearing on 26 May 2022.

Time limits

64.1. were the discrimination and victimisation complaints made within the primary time-limit in section 123 Equality Act 2010?

The tribunal will decide in respect of each of the three claims:

64.1.1 was the claim of the particular claimant made to the tribunal within three months (plus any early conciliation extension) of the act to which the complaint relates?

64.1.2 If not if not was their conduct extending over a period?

64.1.3 If not was the claim made within a further period that the tribunal thinks is just and equitable?

64.1.4 The tribunal will decide.
why were the complaints not made the tribunal time?

64.1.5 In any event is it just and equitable in all the circumstances to extend time?

Unfair dismissal

65. It is agreed that each of the three claimants was dismissed.

65.1. what was the reason all the principal reason their respective dismissal? The respondents say the reason was conduct specifically as follows:

65.1.1. taking unscheduled breaks on Saturday, 5 June 2021 and Sunday, 6 June 2021.

65.1.2. falsification of their own T&A on Saturday, 5 June 2021 and Sunday, 6 June 2021;

65.1.3. leaving their place of work without permission on Sunday, 6 June 2021.

65.2 Did the respondent genuinely believe that the claimant had committed misconduct?

65.3 If the reason was misconduct, did the respondent at reasonably in all the circumstances (including its size and administrative resources) in treating that as a sufficient reason to dismiss the claimant? The tribunal will usually decide, in particular, whether

65.3.1 where were reasonable grounds for that belief
65.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
65.3.3 the respondent otherwise acted in a procedurally fair manner;
65.3.4 dismissal was within the range of reasonable responses.

Direct Race Discrimination (Equality Act 2010 Sections 13 And 39)

66. Each of the claimants relies upon his dismissal (on, respectively, 3 July 2021 6 July 2021 and 3 July 2021) as the less favourable treatment.

66.1. In this connection, Mr Kahsay confirmed that contrary to the intimation paragraph 3.2 of the orders arising from the preliminary hearing held on 31 January 2022 he was not additionally relying upon less favourable treatment by way of the warning given to him in for every 2020 is that issue related to a complaint of race discrimination (case number 2502311/2020), which he acknowledged had been struck out in a judgement of the employment tribunal dated 30 April 2021.

66.2. 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 those of the particular claimant. Each of the claimant says he was treated worse in the following employees of the respondent:
Mr Trevor Soons
Mr Steven Curran and

Mr Michael (last name unknown who was said to work in blue shift production hygiene
Ms Gillian Robinson
Ms Diane Thompson

66.3. In respect of the above, the claimants allege that Mr Soons and Mr Curran went smoking many times but were only given warnings; Michael Strunk work was only given a warning; Ms Robinson and Ms Thompson regularly went for a smoke, but no action was taken against them.

66.4. If any of the claimants was treated less favourably, was that because of race or can the respondent show a non-discriminatory reason for the treatment.

Harassment Related To Race (Equality Act 2010 Section 26)

Mr Kahsay only

67. Did the respondent do the following things:

67.1 On or around 27 June 2021 (Mr Kahsay had initially thought it was 19 June 2021), having been called to a meeting with Mr Craig Dixon and at that meeting Mr Kahsay having said that he (Mr Dixon) was treating black people and white people differently), Mr Dixon responded by pointing his finger and shouting words to the effect, “are you going to take this case to an upper level?”. When Mr Kahsay had replied that they were Mr Dixon said words to the effect, “if you take this case to the upper level, you being trouble yourself.” When saying the above Mr Dixon removed his Covid facemask and threw it on a table. The other two claimants were present time.

67.2 Mr Kahsay explained that the context for this was that in 2021 he and others were not given a copy of an investigation report and they put in a grievance in June 2021.

67.3 If so is that unwanted conduct?

67.4 Did it relate to race?

67.5 Did the conduct out the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Victimisation (Equality Act 2010 Section 27)

Mr Kahsay and Mr Araya only

68. Did either of these complaints do protected act as follows:-

68.1 Along with others, bring a collective grievance relating to pay in or around November 2019?

68.2 The respondent accept that it dismissed Mr Kahsay and Mr Araya on 3 July 2021 and that such dismissals are capable of amounting to a detriment.

68.3 Were either of these claimants dismissed because they had done the above protected act

68.4 In this connection Mr Kahsay confirmed that contrary to the intimation paragraph 5.2 of the orders arising from the preliminary hearing held on 31 January 2022 he was not additionally relying upon detriment in the form of the warning given to him every 2020 is that issue related to a complaint race discrimination which he acknowledged been struck out in a judgement of the employment tribunal dated 30 April 2021.

68.5 although Mr Kahsay maintained that the above collective grievance constituted the protected act he confirmed that he was not relying upon the subject matter that collective grievance as a discrete claim, as such, as that had been the subject of previous claim in the tribunal, which had been resolved under the auspices of ACAS in December 2019.

The LAW

Unfair Dismissal

69 Section 98 Employment Rights Act 1996 sets out the law in relation to unfair dismissal as follows:-

(1) In determining…whether the dismissal of an employee is fair or unfair, it is for the employer to show.
  (a) the reason (or if more than one the principal reason) for the dismissal and
  (b) that it is a reason falling within subsection (2) or some other substantial reason
(2) A reason falls within this subsection if it –

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he is employed to do
(b) Relates to the conduct of the employee.
(c) Is that the employee is redundant.
(d) That the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment,

(4) Where the employer has fulfilled requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a s sufficient reason for the employee, and
(b) Shall be determined in accordance with the equity and substantial merits in the case.

69.1 It is for the employer to establish the reason falls within section 98(2) and therefore is capable of justifying the dismissal. In Gilham v Kent County Council (No2) 1985 ICR 233 CA Griffiths LJ commented that 'this hurdle… is designed to deter employers from dismissing for some trivial or unworthy reason'.

69.2 The Tribunal is required to look at the mental processes of the person or persons authroised to and did in take fac make the decision Orr v Milton Keynes Council 2011 ICR 704 CA.

69.3 Once the reason has been determined the Tribunal must go on to consider whether the decision to dismiss in accordance with subsection (4). At this stage the burden of proof is neutral. The question of reasonableness is a question of fact. In Union of Construction, Allied Trades and Technicians v Brain 1981 ICR 542 CA Donaldson LJ said:; ' It [the tribunal] has to look at the question in the round and without regard to a lawyers technicalities. It has to look at in an employment and industrial realties context and not in the context of the Temple and Chancery Lane.

69.4 Guidance on how to apply section 98(4) in cases relating to conduct may be found in BHS v Burrchell 1978 IRLR 379. The employer must show; that it believed the employee guilty of misconduct; it had in mind reasonable grounds upon which to sustain that belief; at the stage at which the belief was formed it had carried out as much investigation as was reasonable in the circumstances.

69.5 In looking at he investigation the Tribunal must apply the range of reasonable response test, J Sainsbury plc v Hitt 2003 ICR 111. In relation to an investigation the Tribunal had regard to Linfood Cash & Carry Ltd-v-Thomson and the guidance concerning 'absent witnesses.' The case concerned a situation in which witnesses refused to be identified which is not the case here. The guidance applicable to any situation in which a "live" witness will not be present includes: 2. The following are important in taking statements: (a) Date, time and place of each .. incident. .. (d) Whether the informant has suffered at the hand of the accused or has any other reason to fabricate. 3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable. 6. it is desirable at each stage the member of management responsible for the hearing should himself interview the informant and satisfy himself that weight is to be given to the information. 9. It is particularly important that full and careful notes should be taken.

69.6 A tribunal must not substitute its own view of the employers decision to dismiss Foley v Post Office, HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR. A tribunal must consider the reasonable employer and whether 'no reasonable employer' would have dismissed, as established in Iceland Frozen Foods v Jones [1982] IRLR 439, 'the range of reasonable responses test'.

69.7 The Tribunal also had regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and the guidance which accompanies it, in particular paragraph 4; issues should be raised promptly, employers… should act consistently, employers should carry out necessary investigation, employers should inform employees of the basis of the problem and give them an opportunity to put their case

> 69.7.1 At paragraph 46 the code states 'Where an employee raises a grievance during a disciplinary process the disciplinary process may be suspended temporarily in order to deal with the grievance'

69.8 The Tribunal bore in mind that in determining the question of whether the dismissal reasonable or unreasonable the tribunal must have regard to the words of the statute in section 98(4) ' Whether in all the circumstances of the case including the size and administrative resources of the employer, shall be determined in accordance with equity and the substantial merits of the case.' My emphasis.

Direct Race Discrimination:

70.1 Section 13 Equality Act 2010 states that a person A discriminates against another B, if because of a protected characteristic A treats B less favourably than it treats or would treat others.

70.2 Section 23(1) Equality Act 2010 sets out comparison by reference to a comparator as follows: ' On a comparison of cases for the purpose of section13. 14. And 19 there must be no material difference between the circumstances relating to each case

70.3 This was clarified in Shamoon v Chief Constable of Royal Ulster Constabulary 2003 ICR 337 HL. The comparator must be in the same position in all material aspects as the victim save only that he, or she is not a member of the protected class.

70.4The relevant circumstances need not be identical 'what matters is that the circumstances relevant to the treatment are the same or nearly the same for the claimant and the comparator EHRC Employment Code para 3.23. Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School 2003 ICR 937 HL 'all the characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator,

Harassment

71.1 Section 26 Equality Act 2010 sets out what amounts to harassment as follows:

A person A harasses another B if-

(a)A engages in unwanted conduct related to a relevant protected characteristic and

(b) the conduct has the purpose or effect of –

(i) violating Bs dignity, or

(ii) creates an intimidating, hostile, degrading humiliating or offensice environment for B

71.2 Chapter 7 EHCR Code of practice on Employment sets out guidance on harassment including what unwanted conduct may be. Unwanted conduct may extend to graffiti as well as verbal comments, gestures jokes and pranks.The phrase 'related to the protected characteristic' has a broad definition .

Victimisation

72.1 The employer must not subject the employee to a detriment because they have done a protected act

72.2 A detriment is anything which an individual might reasonably consider changed their position of the employee for the worst or putting them at a disadvantage,

72.3 the employer must either knows that the employee has done a protected act or believes that the employee has done a protected act. The following are protected acts: bringing proceedings under the Act; given evidence or information in connection with proceedings under the Act; done any other thing for the purpose or in connection with the act ; made an allegation that a person has contravened the Act

72.4 Conduct will be a detriment if a reasonable worker might take the view in all the circumstance that the conduct was to the workers detriment the test is satisfied Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065 HL.

Burden of Proof

73.1 For all claims brought under the Equality Act the tribunal must apply the burden of proof found in Section 139 of the 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.

73.2 Although the 'shifting burden of proof' is a two-stage test, Tribunals in a series of cases in the EAT are advised not to slavishly or mechanistically follow it. Rather that the focus must at all times be the question whether or not they can properly infer… discrimination' Per Elias J Laing v Manchester City Council and another 2006 ICR 1519 EAT

Submissions

74.1The Tribunal received written submission by all parties which are not rehearsed here.

74.2Claimant 1makes a number of complaints about the procedure. He was treated differently to other white persons.

74.3 Claimant 2 states that the organisation is racist and that his dismissal was pre planned.

74.4Claimant 3 the investigation was not carried out properly at any stage and that Mr Murphy had made his decision before the hearing. Other people who did the same thing were not sacked. They are white.

74.5 Respondent's case is that it carried out a fair procedure and on the facts it was reasonable for Mr Murphy to dismiss. In so far as race is concerned, it had no bearing on the evidential matters that Mr Murphy had to decide.

74.6 The respondent relies primarily on the issue of comparators in relation to the race discrimination. That is that the comparators used were materially different to the to the claimants.

Discussion and Conclusions

75.1 In coming to our conclusions the Tribunal bears in mind the size of the respondent company and the resources available to it. The respondent is a large company and had the facility of human resources and occupational health/medical available to the Bailiiol site. It has a comprehensive handbook setting out its policies and procedures. The Tribunal was therefore surprised at the manner in which its managers deal with a number of issues.

75.2 The issue of time limits was not pursued as Claimant 1 was not making any claims in relation to, historic matters but simply relying upon them as background.

Unfair Dismissal

76.1 Genuine Belief

The Tribunal concluded Mr Murphy had a genuinely belief in the claimants misconduct on the basis that all three had returned from their break together, then all three had left the production floor for excessive amount of time and then taking an further break he considered that they had falsified their TA.

Reasonable

76.2 However the Tribunal went on to look at whether or not that belief was reasonable based on a number of factors. The Tribunal concluded that Mr Murphy had gone into the disciplinary with a closed mind, he gave a clear indication that he believed what he had been told from Ms Howe and Mr Jones i.e that all three were absent together was true. Having considered the disciplinary hearing there was no probing of the events as set out by Joanne Howe and Tony Jones. Mr Murphy clearly did not doubt the quality of the investigation, of which more below. He did not submit the evidence he had to a critical assessment which may have led him to cause further enquiry to be made. In relation to Claimants 2 and 3 reference is made throughout to taking unscheduled breaks although reference in hearings was only made to one. If in fact the respondent's case is that these two claimants took additional time because they then had a further break in the afternoon this is not made clear.

76.3 In so far as race was raised during the process Mr Murphy does not address this at all. In particular the suggestion from the third claimant that Tony Jones was a racist and 'treats us differently' is of particular importance when the explanation proffered was that they were in the toilets. The evidence that they were not comes in a very indirect way from Mr Jones.

76.4 In relation to the first Claimants assertion of a bowel syndrome, this was not followed up by Mr Murphy despite the fact that there was Occupational Health available on site. Although in relation to comparator F, Mr Dixon had consulted with Occupational Health as to a health issue.

76.5 The Tribunal concluded that the manner in which Mr Murphy dealt with the hearings was not in accordance with good industrial practice. The respondents' case was that all three men were together for the period of the absence, despite Mr Murphy's assertions that he dealt with them as individuals he clearly did not. He refers to having statements from others saying they were in the toilet at the time. In concluding this the Tribunal noted the email from Ms Walker to Mr Long, which the Tribunal concluded sets out the respondents view of this atter. 'On face value the difference between the three dismissal is that we believed they lied because there were 3 of them. If they did it one at a time then one would assume that no further action would have been taken'

76.6 He dismissed Claimant 1 before he had heard from claimant 2 or 3 which is indicative of his mindset. In particular it is clear that the first claimant was not present at the briefing with Joanne Howe.

Investigation

77.1 The Tribunal identified the following issues with the investigation, that is to say the steps a reasonable employer would have taken in this case;

i. Failure to challenge on return to shop floor; This meant the claimants were not asked about it until the following weekend. This is important where the respondent relies on inconsistencies in deciding to dismiss. Contrast this with Ms Howe who could not remember the date of the briefing, although there was an email with the relevant date.
ii. The Tribunal concluded that Ms Howe was targeting claimants 2 and 3. This is on the basis that they had previously been found together on a phone and the fact that she clearly was waiting for them to return to the shop floor.
iii. Failure to formally interview Howe and Jones. The fact statements were not taken or shown to the claimants were unable to probe their accounts as the Linford Food case envisages.
iv. If Ms Howe thought they were I the car why didn't she just go and check
v. IBS (bowel syndrome) was not followed up
vi. SN says JM spoke to TJ about how he checked the loo, statement, note, not put to Cs
vii. Other Conversations with JH and TJ not noted supplied not recorded and not provided to Cs

The Issue of Race

78.1 This was raised by all the claimants and at the time of the disciplinary hearing it was clear that all three wished to lodge a grievance. Mr Dixon, having asked Ms Howe to ascertain the views of all claimants, told her not to engage with them about it. The email was copied to Mr Murphy. The email concludes with the words 'If this is the case could you please **reply all** so we can start the investigation process'. No investigation commenced. Mr Murphy seemed to think it was up to the claimants to pursue it, but the clear indication from the email is that Mr Dixon would start investigating, but he did not.

78.2 The Tribunal asked itself what is the impact of this upon the reasonableness of the investigation and the decision by Mr Murphy to dismiss. The ACAS Code gives guidance on the matter and it is good industrial practice that where a grievance may be linked to disciplinary, an employer at the very least must consider what course of action to take. That is to say, should the disciplinary proceed of be put on hold, or should the two be combined. Where the two are interlinked, as suggested by these claimants, it may be prudent to put the disciplinary on hold until the race allegation is dealt with, and the Tribunal concluded that that is what a reasonable employer would

do. This respondent did not address its mind to this at any stage including the two appeals.

78.3 In this case no investigation was conducted either before, during or after the disciplinary hearings and the dismissals.

78.4 In the disciplinary meetings Mr Murphy does not turn his mind to the issue of race even though he was aware it was being raised.

78.5 In the meeting Mr Murphy did not even explore the possibility that Mr Jones may have been biased against the claimants for another reason entirely.

The Appeals

79.1The Tribunal went on to consider if the appeals remedied any of the above matters. At each stage the respondent, i.e. the decision maker should their mind to the issues. Not of the issues raised above were properly addressed at the appeals. Of particular importance is the issue of the grievance and what action should be taken about it.

79.2 The Tribunal concluded that Mr Nicholson was not 100% sure T Jones had walked through the toilets. He felt it necessary to have a conversation with Mr Murphy about this but he did not go back to and speak to Jones directly.

79.3 He was dismissive in relation to Medical from claimant 1. The respondent had access to an onsite occupational health professional but Mr Nicholson did not avail himself of their expertise.

79.4He also dealt with all three claimants' cases together.

79.5The Tribunal concluded that the dismissals were procedurally unfair.

Direct Race Discrimination

80.1 At face value it would appear that there is a difference in treatment between the claimants and the comparators, however the Tribunal has to examine each comparator to establish if there is no material difference between the circumstances of each case and the claimants.

80.2 The claimants rely upon five comparators in relation to their claim of race discrimination. Of the comparators relied on the Tribunal immediately dismissed C and D from its consideration. Comparator C was discovered to be asleep, and although this may be considered as

falsifying his clock, it is clear that there were genuine reasons for his behaviour. Comparator D was dismissed for falsifying his clock so there is no difference in the treatment. Comparator 4 was also dismissed.

80.2 Turning to the other Comparators. They all seem to have one factor in common, they have taken advantage of a situation. That is to say A was smoking whilst seeking advice on a work matter; It was accepted that B had issues on going out of work and that he needed support. Ms Robinson and Ms Thompson took advantage of the fact that they were tasked to clean the smoking shelter. In addition, all of them made admissions to wrongdoing, apologised and indicated it would not happen.

80.3 The Tribunal concluded that there was a material difference in the circumstances of all the comparators referred to and the circumstances of each of the claimants.

80.4On the evidence we heard Mr Murphy placed great reliance on the fact that the comparators who were not dismissed did make admissions and apologised.

80.5 If however, the Tribunal is wrong about that the comparators. It is satisfied having considered all the evidence including the flaws in the procedure that the dismissals were not because of the claimants' race.

Harassment

81.1 Mr Dixon went onto site because he was aware the claimants were unhappy. The Tribunal concluded he went in following email at 9:35, By the time he arrived at site he was fired up because he had had to attend work on his down day.

81.2 As the Tribunal accepted the claimants account in relation to the events of 27th June, The tribunal asked itself three questions, first was it 'unwanted conduct' second was it related to the protected characteristic of race did it create an intimidating, hostile, degrading humiliating or offensive environment. Having accepted the claimants' account. The tribunal went on to consider if this was related to race.

81.2 The Tribunal concluded that the behaviour of Mr Dixon on that day was unacceptable, to raise his voice to a junior employee is undesirable to then throw his mask onto the desk was reprehensible. This is not only

unwanted conduct but would create an intimidating, hostile, degrading humiliating or offensive environment for the first claimant.

81.3 That is not the end of the matter, the Tribunal must consider why Mr Dixon did this. The Tribunal considered words used by Mr Dixon were significant, 'If you want to take this higher you will be in big trouble'. He was aware that the claimant wanted to pursue race allegations and was clearly 'fired up'. The Tribunal concluded that the actions and words are linked together and were because of the claimants wishing to pursue their race claim. Therefore they was subjected to harassment related to their race.

Victimisation

82.1 This applies to claimant 1 and 3. The grievance in 2019 is accepted by the respondent as a protected act. Dismissal is a detriment for the purpose of section 27 Equality Act 2010. The question the Tribunal must ask itself is, did the respondent dismiss the claimants because of the previous grievance.

82.2 The Tribunal concluded it did not. A number of years had passed since the grievance and the respondent had had opportunity to dismiss the first claimant on at least one occasion for his threatening behaviour in 2019 and did not do so. This was much closer in time to the protected act. The tribunal concluded d that the reason for the dismissal was not because of the protected act and since that date the claimant has faced disciplinary hearings for other matters, which may have lead to his dismissal and did not.

82.3 Similarly in relation to the third claimant, he could have been disciplined for earlier when found in the locker room but was not. In addition there is the passage of time which makes it difficult to draw a causative link between the protected act and dismissal.

Conclusions

84. All three claimants were unfairly dismissed because of procedurally failings in the investigation including the reasonableness of the belief of the decision maker.

85. None of the claimants were subjected to Race discrimination.

86 Neither claimant 1 nor 3 were subjected to acts of victimisation.

87. Claimant 1 was the subject of harassment related to his race.

Employment Judge AE Pitt
Date 2nd June 2023