Case No : 2201538/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr Nigel Wills

Respondent: Network Rail Infrastructure Limited

Heard at: London Central (by CVP) **On:** 27 & 28 February, 1, 2 & 24 March 2023

Before: Employment Judge Professor A C Neal

Members: Ms Susan Went
Mr Steven Hearn

Appearances

Claimant: Miss S Aly (Counsel)

Respondent: Miss K Hosking (Counsel)

JUDGMENT

(1) The Claimant's claim alleging unfair dismissal is dismissed;

(2) The Claimant's claim alleging breach of contract is dismissed;

(3) The Claimant's claim alleging unlawful discrimination by reference to the protected characteristic of race is dismissed.

REASONS

NOTE

This case was heard over five days by CVP. Oral judgment was delivered with full reasons in the presence of the parties on Day 5. The Judgment was drafted for

promulgation on 24 March 2023. However, it seems that the written Judgment was never promulgated. An enquiry was subsequently made on behalf of the Claimant, who also applied for full written reasons to be provided. That application was passed to the Employment Judge who asked for enquiries to be made as to what had happened subsequent to 24 March 2023. Although no application had been made to the Tribunal (the Employment Judge and the two non-Legal Members) at the hearing, it appeared that some indication had been given to the Clerk that the Claimant was minded to seek written reasons. In light of the confusion in relation to this matter, the Employment Judge has treated the Clerk's note made on 24 March 2023 as a request made at the hearing for written reasons within the scope of Rule 62(3) of the **Employment Tribunals Rules of Procedures 2013**. The Tribunal places on record its apologies for the confusion and delay which has attended this.

BACKGROUND

1. The Claimant presented five claims, alleging (1) unfair dismissal; (2) breach of contract; (3) unlawful direct discrimination by reference to the protected characteristic of race; (4) failure to make reasonable adjustments by reference to the protected characteristic of disability; and (5) victimisation by reason of having done a protected act.

2. Following a hearing conducted remotely by Employment Judge Burns on 15 June 2022 a Deposit Order was made in relation to claims (3), (4) and (5). It is common ground that no deposit was paid in relation to claims (4) or (5). However, a deposit was paid by the Claimant in relation to claim (3).

3. In consequence, the Tribunal has had before it three claims, alleging (1) unfair dismissal; (2) breach of contract; and (3) unlawful direct discrimination by reference to the protected characteristic of race.

4. The case was heard by CVP over five days, with both parties being represented by Counsel. The Tribunal places on record its appreciation to Counsel for the careful and thorough manner in which the respective cases were presented throughout the hearing.

5. Witness evidence was given on Days 1 – 4 after which submissions were made by Counsel for each of the parties. The Tribunal took time to deliberate on the afternoon of Day 4 and finalised their decision on the morning of Day 5. Judgment was delivered in the presence of the parties on Day 5.

6. A bundle of documents running to 329 pages was prepared and presented to the Tribunal for use during the hearing. This was augmented by a further bundle of documents referred to as the "Disciplinary Case Report" running to 47 pages. References in this judgment to page numbers are to the numbered pages in the electronic version of the first bundle of documents and the sequential numbering (from 330 onwards) of the Disciplinary Case Report. The Tribunal were also shown a number of video files containing CCTV footage in relation to a location at which the Claimant had been employed.

7. The Claimant gave evidence under oath on the basis of a prepared witness statement running to 109 paragraphs. He also called two further witnesses in his cause – (1) Mr Andre Strampe (Local Staff Union Rep. for the RMT trade union at Liverpool Street SDC signal box) who gave evidence under oath on the basis of a prepared witness statement running to 5 paragraphs and a supplementary witness statement running to 6 paragraphs, and (2) Mr Samuel Addo (RMT Branch Secretary of Waltham Cross & District) who gave evidence under oath on the basis of a prepared witness statement running to 19 paragraphs and a supplementary witness statement containing one paragraph. Counsel for the Respondent cross-examined each of the witnesses and the Tribunal panel members intervened with additional questioning.

8. On behalf of the Respondent Mr Ian Martin was called to give evidence which he did under oath on the basis of a prepared witness statement running to 57 paragraphs. Evidence from Mr Thomas Shannon was received by way of a prepared witness statement running to 21 paragraphs. However, at the time of the hearing Mr Shannon was not available to give that evidence under oath, since he was located abroad and no arrangements had been made to overcome the foreign jurisdiction formalities necessary to facilitate that. The Tribunal have therefore treated his evidence as received in the form of an unsworn statement which had not been subjected to cross-examination. On the morning of Day 4 Ms Jacqui Hall gave evidence on the basis of a prepared witness statement running to 10 paragraphs. Counsel for the Claimant cross-examined each of the witnesses (apart from Ms Hall) and the Tribunal panel members intervened with additional questioning.

ISSUES

9. A "Schedule of Claims and Issues" was agreed between the parties at a preliminary hearing before Employment Judge Burns on 15 June 2022. This was set out as follows:

SCHEDULE OF CLAIMS AND ISSUES

JURISDICTION

1. Was the Claim, or any part of the Claim, submitted outside of the applicable time limit in respect of the Claimant's claims?
2. If so, do all of the alleged acts or omissions which the Claimant refers to in the Claim form part of a chain of continuous conduct which ended within the applicable time limit of the Claim being submitted?
3. If not, would it be just and equitable for the Tribunal to extend time to hear that part of the Claim which relates to the alleged acts or omissions which occurred outside of the applicable time limit?

UNFAIR DISMISSAL

4. Was the Claimant dismissed for a potentially fair reason pursuant to section 98(2)(b) of the Employment Rights Act 1996 (ERA), namely misconduct?
5. If the Respondent cannot show that the Claimant was dismissed for conduct, can the Respondent show that the Claimant was dismissed for some other substantial reason, pursuant to section 98(1)(b) ERA?
6. Did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissing the Claimant, in that:
    a. Did the Respondent form a genuine belief that the Claimant was guilty of misconduct?
    b. Did the Respondent have reasonable grounds for that belief?
    c. Did the Respondent form that belief based on a reasonable investigation in all the circumstances?

7. Was the dismissal of the Claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the Respondent?
8. Did the Respondent follow a fair procedure when dismissing the Claimant? Did the Respondent follow the ACAS Code of Practice?
9. If the Claimant's dismissal is found to be unfair, did the Claimant's conduct cause or substantially contribute to his dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?
10. If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just and equitable to reduce the compensatory award?
11. Has the Claimant taken reasonable steps to mitigate his losses?

WRONGFUL DISMISSAL

12. Did the Respondent breach the Claimant's contract of employment by dismissing him/her without notice, or without pay in lieu of notice?

DISABILITY

13. Is the Claimant disabled within the meaning of section 6 of the Equality Act 2010?
14. Did the Claimant have a physical or mental impairment? The Claimant relies upon anxiety and depression.
15. If so, did that impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
16. If so, was that adverse effect long-term? In particular, when did it start and:
    a. has the impairment lasted for at least 12 months?
    b. or was the impairment likely to last at least 12 months, if less than 12 months?
17. Was the Claimant disabled at all material times?

FAILURE TO MAKE REASONABLE ADJUSTMENTS

18. Did the Respondent apply a provision, condition or practice? The PCPs claimed by the Claimant are (i) the Respondent's disciplinary process and (ii) the regime or absence of a regime in place for support of mental health problems among the Respondent's employees.

[There is no 19]

20. Did that PCP place the Claimant at a substantial disadvantage in comparison with employees who were not disabled?
21. Did the Respondent make reasonable adjustments? Those which the Claimant claims should have been made were: (per para 38 of the POC)
    a) Undertake the disciplinary in a timely fashion
    b) Keep the Claimant updated as to what was happening with the disciplinary process
    c) Treat the Claimant with respect, maintain a balanced and objective approach rather than a suspicious one
    d) Produce contemporaneous witness statements
    e) Support the Claimant in respect of his mental health, for example when the Claimant asked CR for partial financial assistance for therapy, the request was rejected.

DIRECT RACE DISCRIMINATION

22. The Claimant states his race is Caribbean mixed race. The acts relied on as less favourable treatment in the direct race discrimination claim are: dismissal on 13/12/2021. He is to state any actual comparators in further particulars as ordered above.

23. Did the Respondent treat the Claimant less favourably than it would have treated a comparator sharing the Claimant's circumstances, save for his race?

24. Can the Claimant establish facts from which a Tribunal could properly decide, in the absence of any other explanation, that the Respondent treated the Claimant less favourably because of his race?

25. If so, can the Respondent show that the Claimant's [race] was not the reason for the difference in treatment?

VICTIMISATION

26. Did the Claimant do a "protected act" as defined by section 27(2) of the Equality Act 2010? The Claimant claims the following as protected acts: an oral complaint on 8/6/21 to CR about WH throwing a book at him and a formal grievance on 22/6/21 about the same matter (which was unrelated to the toolbox issue)

27. Did the Respondent subject the Claimant to a detriment? The acts relied upon by the Claimant are the disciplinary action leading up to and including the dismissal on 13/12/2021.

[27] If so, did the Respondent do so because the Claimant did a "protected act"?

REMEDY – DISCRIMINATION

28. What financial losses has the discrimination caused the Claimant?

29. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

30. If not, for what period of loss should the Claimant be compensated for?

31. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

32. Is there a chance that the Claimant's employment would have ended in any event? Should his compensation be reduced as a result?

33. Should interest be awarded? If so, how much?

10. Following discussion with Counsel it was confirmed that, in consequence of the non-payment of a deposit in relation to two of the Claimant's claims, the issues set out above in relation to "Disability", "Failure to make reasonable adjustments" and "Victimisation" are no longer relevant.

FINDINGS OF FACT

11. Having regard to the oral evidence given by the witnesses, together with documents included in the bundle prepared for this hearing, the Tribunal makes the following findings of fact:

(1) The Claimant commenced employment with the Respondent on 1 June 2003. His employment was as a Signaller. He initially described his race as being "Caribbean mix race", and then indicated that for the purposes of this litigation he should be described as "Black".

(2) On 9 May 2021 a contractor operating on the Respondent's site reported that a toolbox was missing. Steps were taken to review CCTV footage relating to the time before the reported loss, including footage showing activities on the night of Thursday/Friday 6-7 May 2021 when the Claimant was at work on the site in question. [Bundle 71 – see Roster]

(3) It is undisputed that the CCTV footage was reviewed by Mr Andrew Preece (Service Delivery Manager at the site), together with Ms Daphne Davies-Porter (who did not feature in any of the subsequent events). A report of what had been observed in the course of the review was made to Ms Claire Repeti (who was the Claimant's direct line manager) on the night of 6 May.

(4) The report made by Mr Preece to Ms Repeti was in terms of there having been a complaint by the contractor of a "theft" of the toolbox. Ms Repeti was also informed that the CCTV footage appeared to show the Claimant removing a toolbox and placing it in the boot of his car.

(5) On Monday 10 May 2021 Ms Repeti and Mr Preece arranged for a "fact-finding interview" to be held with the Claimant. Mr Preece contacted the Claimant to tell him to meet with himself and Ms Sophia Morgan (Operations Manager) on Tuesday 11 May and to inform the Claimant that he had been released from duty for the night shift that he had been rostered to undertake on the Monday night.

(6) Also on the Monday evening Ms Repeti received a telephone call from Mr Mark Georgiou, which she reported in writing to Mr Reeves in the following terms [Bundle 99]:

> **On Monday evening I received a phone call from Mark Georgiou. Mark said he had been contacted by Nigel who had informed him that he was required to see me and he hadn't been given a reason why. Mark asked what was the reason? I said I couldn't discuss it and Mark asked if it was regarding the tool box. I asked Mark what he knew about that and he said that Nigel had contacted him on his way home from duty on Friday 07/05/2021 to inform him that he had found a tool box at the IECC and taken it home for safekeeping and that Nigel had asked Mark to inform one of the management team which Mark had forgotten to do. I was in the IECC with Mark on the Friday and it wasn't mentioned. I asked Mark to confirm this in writing to me. I understand that Nigel informed Mark he had found the tool box at the end of his shift on Friday morning and not wanting to be delayed getting home had put it in his boot, which isn't the timeline according to the CCTV. Mark did not send me anything in writing.**

(7) On 11 May 2021 the Claimant duly attended an "Investigatory Interview" with Ms Morgan in the company of his trade union representative (Mr Keith Norgrove). Ms Repeti also attended as "Notetaker". [Bundle 75-78]. The notes of the meeting were not challenged, and, indeed, the Claimant in his own witness statement confirms much of what was said in the notes of the meeting on that occasion.

(8) During the course of that "Investigatory Interview" the Claimant gave his account of what had happened on the night of 6-7 May. He confirmed that, having seen the toolbox, he had picked it up, covered it with his jacket, and taken it to his car where he had put it on a sheet. He explained that:

> **…on my way home I was going to call Andy Preece but decided as it was early I would call Mark and mentioned to him that when he got into the office to mention it if anyone asks, but I understand he hasn't been in since and he hasn't mentioned it.**

The Claimant also stated that:

> **I know how it looks but there is nothing sinister.**

as well as saying:

> **I want to apologise for my actions and for bringing the company into disrepute, the protocol isn't to the book and I understand that.**

(9) Towards the end of the meeting Ms Morgan indicated that "Next steps are that it will be going to investigation and I'm not sure who that will be, but they will be in touch with you." She commented that "I can't quite work out what has gone on here and there is an external company involved."

(10) On the days following the meeting (12-14 May 2021) the Claimant was off work, returning on 15 May. Thereafter on 23 June 2021 the Claimant commenced long-term sickness absence, eventually returning to work on 1 October 2021.

(11) On 7 October 2021 a "Disciplinary Investigation hearing" was convened for the Claimant, which he attended with his trade union representative (Mr Andrew Strampe). The Investigation Manager was Mr Tommy Reeves, who had been appointed to that role on 11 June 2021. Mr Mike Mcgarry also attended as Notetaker and his notes of that hearing have been produced to the Tribunal [Bundle 89-95].

(12) It is clear from the documentation and, in particular, from the pack provided to the Investigation Manager and for the Claimant's representative that a number of individuals had been approached in the period leading up to that meeting of 7 October, and a list of those witnesses, together with what were described as "witness statements" from them, was also provided for Mr Wilson's representative. These arrangements are set out in the notes, which were not challenged on that point.

(13) At the end of the meeting on 7 October 2021, what was called a "Disciplinary Investigation report" was drawn up at the instigation of Mr Tommy Reeves [Bundle 109-113]. The outcome recommendation from that meeting was that "formal action" should take place as a result of the investigation under the Respondent's Disciplinary Policy and Procedure [Bundle 112].

(14) This marked the shift from an "investigation" phase under Mr Reeves to "formal action" which would be in the form of a disciplinary hearing. Arrangements for a Disciplinary Hearing were eventually set up, and on 8 November 2021 Mr Ian Martin sent an email to the Claimant [Bundle 114-115], which was followed up by a hard copy letter dated 10 November 2021 [Bundle 116-117], notifying him that he was required to attend a disciplinary hearing on 22 November 2021 and that Mr Martin would be chairing it. The email stated:

> **The purpose of the hearing is to consider the following allegation of gross misconduct against you. The allegation is that:**
>
> **On 7th May 2021 you removed a toolbox from within the compound at Liverpool Street IECC. You took the toolbox home in your car without**

> **permission and only returned it once notified of a meeting with Claire Repeti. This is a potential case of theft, which is regarded as gross misconduct under section 2.10.2 of Network Rails disciplinary policy, which includes, theft, fraud or deliberate falsification of records.**

Mr Martin then went on to clarify that Mr Wills had a right to be represented – and indeed he took advantage of that – and Mr Martin concluded by stating:

> **If you are found guilty of misconduct, this may lead to a decision to issue you with a first written warning, a final written warning or in the case of gross misconduct, possible dismissal as set out in the enclosed Disciplinary Procedure.**

(15) On 22 November 2021 the Claimant duly attended the Disciplinary Hearing with his trade union representative, Mr Strampe. Miss Vivian Mulholland (Employee Relations Advisor) attended as the note-taker. The notes drawn up at that meeting have been shown to the Tribunal [Bundle 118-131] and, broadly speaking, there was no challenge made to the accuracy of those.

(16) Various matters arose during the course of that hearing which caused Mr Martin to conclude that something more needed to be done. In consequence, he adjourned the hearing (on 22 November) in order to follow up on those matters. In particular, this related to Mr Mark Georgiou, of whom mention has been made already, as the person said to have been contacted on the night in question by the Claimant. Mr Martin was seeking clarification from Mr Georgiou about those alleged communications between himself and the Claimant, so an interview was arranged with Mr Georgiou for that purpose. A formal record of Mr Martin's interview with Mr Georgiou was presented to the Tribunal [Bundle 135-137].

(17) Following this, and once Mr Martin had undertaken his further enquiries, there was some discussion about when and how it might be possible to timetable a reconvened hearing having regard to the availability of the Claimant's trade union representative. Eventually, the Disciplinary Hearing was reconvened on 13 December 2021 and Mr Strampe was able to attend with the Claimant. The notes of that reconvened hearing have also been shown to the Tribunal [Bundle 141-142].

(18) Having completed the Disciplinary Hearing, Mr Martin announced his decision orally at the end of the session on 13 December and this was recorded in the notes of the hearing [Bundle 142]. That decision was then communicated formally to the Claimant in a letter dated 13 December 2021 [Bundle 143-145]. The outcome was stated in these terms:

> **I am writing to confirm that, following the disciplinary hearing held 22nd of November 2021, and reconvened 13th December 2021, under Network Rail's Disciplinary Procedure, it was decided that your employment with Network Rail should be terminated without notice for gross misconduct.**
>
> **The reason for your dismissal is that on 7th May 2021 you removed a toolbox from within the compound at Liverpool Street IECC. You took the toolbox home in your car without permission and only returned it once notified of a meeting with Claire Repeti, Local Operations Manager. This is a considered**

> **theft and deemed gross misconduct under section 2.10.2 of Network Rails Disciplinary Policy.**

Mr Martin then rehearsed the reasons that had led him to that conclusion, and stated:

> **Having taken all of the evidence into consideration, I have decided your actions on the 7th of May amount to theft and this was such a serious breach of your obligations that it calls for dismissal without notice and without any warnings.**

(19) The decision letter dated 13 December 2021 which terminated the Claimant's employment without notice also set out the Claimant's right to appeal against Mr Martin's decision, and eventually Mr Wills duly exercised that right of appeal. He sent a notice of appeal by email on 21 December 2021 [Bundle 151], with grounds for the appeal put on two bases: (1) that "there has been a serious misinterpretation or misinterpretations of the facts"; and (2) "the severity of the punishment given". The Claimant and his advisors set out fuller details of those appeal grounds in a document which they appended to the notice of appeal [Bundle 153-156].

(20) On 5 January 2022, in response to the notice of appeal, Mr Thomas Shannon wrote to the Claimant [Bundle 159-160], to inform the Claimant that he would be conducting the appeal. Mr Shannon invited the Claimant to an Appeal Hearing which was to take place on 19 January 2022.

(21) Eventually, when everybody got together for the Appeal Hearing on 19 January, there was some confusion over the arrangements for recording and note-taking. That confusion was explained to some extent during cross-examination of the Respondent's witnesses and by reference to the contemporaneous documentation, but the absence of Mr Shannon (for the reason set out above) meant that no direct explanation was forthcoming from the appeal officer (a matter which was raised by Miss Aly in the course of her submissions to the Tribunal). In any event, the meeting went ahead and a note of the "key points discussed" and addressed in the hearing was prepared by Mr Shannon in a document headed "Appeal Summary Template". It was accepted that he put that note together – it is very short – on 26 January 2022 [Bundle 164].

(22) On 28 January 2022 Mr Shannon wrote to the Claimant as follows:

> **It has been decided to uphold the original decision made at the disciplinary hearing on 13th December 2021.**
>
> **The reason for your dismissal was that on 7th May 2021 you removed a toolbox from within the compound at Liverpool Street IECC. You took the toolbox home in your car without permission and only returned it once notified of a meeting with Network Rail management.**
>
> **This is a considered theft and deemed gross misconduct under section 2.10.2 of Network Rail's Disciplinary Policy.**
>
> **The CCTV footage of the removal of the toolbox and the failure to report to the appropriate person in charge at the time lead me to believe that the sanction given was fair.**

Mr Shannon then finished off his communication to the Claimant by saying that:

> **Our decision on this is now final and there is no further right of appeal under the disciplinary procedure.**

(23) Thereafter, having been dismissed and with his appeal having been rejected, and after complying with the ACAS Early Conciliation requirements, the Claimant commenced proceedings before the Employment Tribunal by presenting his Claim Form ET1 on 29 March 2022.

THE APPLICABLE LAW

(1) UNFAIR DISMISSAL

12. Section 95(1)(a) of the **Employment Rights Act 1996** provides that:

> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) —**
>
> **(a) the contract under which he is employed is terminated by the employer (whether with or without notice), …**

13. Section 98(2) of the **Employment Rights Act 1996** provides that:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it —**
>
> **(a) …**
>
> **(b) relates to the conduct of the employee, …**

14. Section 98(4) of the **Employment Rights Act 1996** provides that:

> **(4) … where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

15. Section 207 of the **Trade Union and Labour Relations (Consolidation) Act 1992** provides that:

> **(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.**
>
> **(2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question. …**

The relevant Code of Practice for present purposes is the **ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015)**.

(2) BREACH OF CONTRACT

16. **Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** provides that:

> **Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if —**
>
> **(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**
> **(b) the claim is not one to which article 5 applies; and**
> **(c) the claim arises or is outstanding on the termination of the employee's employment.**

(3) DIRECT RACE DISCRIMINATION

17. Section 4 of the **Equality Act 2010** provides that:

> **The following characteristics are protected characteristics —**
> **…**
> - **race;**

and Section 9 of the 2010 Act provides that:

> **(1) Race includes –**
> **(a) colour;**
> **(b) nationality;**
> **(c) ethnic or national origins.**

18. Section 13 of the same Act deals with "direct discrimination" and provides that:

> **(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.**

…

(8) This section is subject to sections 17(6) and 18(7).

19. Section 23 provides that:

(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.

…

20. The relevant part of Section 25 provides that:

…

(6) Race discrimination is —

(a) discrimination within section 13 because of race;

…

21. Section 120 of the **Equality Act 2010** provides that:

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to —

(a) a contravention of Part 5 (work);

(b) a contravention of section 108, 111 or 112 that relates to Part 5.

…

22. Section 136, which is concerned with the burden of proof, provides that:

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) …

(6) A reference to the court includes a reference to —

(a) an employment tribunal;

(b) …

DISCUSSION

(1) UNFAIR DISMISSAL

23. There is no dispute that the Claimant was "dismissed" within the meaning of Section 95(1)(a) of the **Employment Rights Act 1996.**

24. It is also agreed that the Claimant was dismissed for the reason of "conduct" within the meaning of Section 98(2)(b) of the 1996 Act. A description of the conduct in question was set out in the letter notifying the Claimant of the investigation hearing, as well as in the eventual decision made by Mr Martin, and in the final outcome letter communicating the rejection of the Claimant's appeal by Mr Shannon.

25. The Tribunal is grateful for the submissions of Counsel in relation to the approach to be adopted in relation to the statutory test of "fairness" set out in Section 98(4) of the 1996 Act. It is common ground that this case turns upon the well-established principles to be found in the case of **British Home Stores Ltd v. Burchell, [1980] ICR 303** as set out in the judgment of Arnold J. in the Employment Appeal Tribunal:

> **What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.**

It was also common ground that this includes having regard to the propositions concerning the "band of reasonable responses" to be found in the judgment of Browne-Wilkinson J. in the Employment Appeal Tribunal case of **Iceland Frozen Foods Ltd v. Jones, [1983] ICR 17**:

> **(1) the starting point should always be the words of section [98(4)] themselves;**
>
> **(2) in applying the section an [Employment] Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the [Employment] Tribunal) consider the dismissal to be fair;**
>
> **(3) in judging the reasonableness of the employer's conduct an [Employment] Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;**
>
> **(4) in many (though not all) cases there is a "band of reasonable responses" to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;**
>
> **(5) the function of the [Employment] Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable**

> **employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.**

26. Bearing in mind the guidance to be drawn from the case-law, and having regard to the wording of Section 98(4) of the 1996 Act, the Tribunal has unanimously formed the view that Mr Martin, in reaching his decision to dismiss the Claimant at the Disciplinary Hearing, honestly believed that the Claimant had been guilty of the conduct alleged.

27. Furthermore, Mr Martin's honestly-held belief was reached on the basis of reasonable grounds to sustain the belief, derived from what, in the view of the Tribunal, had been a conscientious and thoroughgoing investigation – certainly amounting to as much investigation into the matter as was reasonable in all the circumstances of the case. In relation to the material before Mr Martin, much of this had been revealed in the careful initial investigation undertaken by Mr Reeves and distilled into the "Disciplinary Investigation report" drawn up at the instigation of Mr Reeves. That investigation-derived material was not simply accepted at face value, and it is undisputed that Mr Martin took significant steps to follow up a number of matters – including, in particular, enquiring further into the nature of the alleged communication from the Claimant to Mr Georgiou (for which purpose Mr Martin adjourned the Disciplinary Hearing).

28. In the light of the conclusion drawn by Mr Martin on the basis of his honestly-held view of the Claimant's guilt, the Tribunal is unanimously of the view that the sanction of dismissal without notice was clearly within the band of reasonable responses open to Mr Martin. Whether or not the Tribunal might have regarded that outcome as somewhat harsh, that is not a matter for them to comment upon.

29. For completeness, the Tribunal was satisfied that the disciplinary procedures invoked by the Respondent were carefully constructed and appeared to be entirely reasonable. The formal communications with the Claimant were clear, the purpose of the various stages was made clear to him, the potential consequences of an adverse finding of guilt were fully spelled out, and the operation of the procedures was clearly in line with the provisions under which the investigation, the disciplinary hearing, and the appeal instance were conducted. The Tribunal was assisted by the highly professional evidence of the two trade union witnesses, and it also has to be noted that the Claimant conducted himself with directness and candour when under cross-examination – not seeking to evade the evidence presented to him by Counsel or in questions from the Tribunal.

30. In relation to the outcome of the appeal hearing as recorded in the "Appeal Summary Template" prepared by Mr Shannon [Bundle 164], the Tribunal have noted the observations made by Miss Aly in relation to the conciseness of that summary. Due consideration has also been given to the absence of Mr Shannon to give direct evidence under cross-examination. However, at the end of the day, the content and conduct of the appeal stage were fully covered in the Claimant's own witness statement, together with the evidence given by his trade union representative. The Tribunal is unanimously of the view that nothing done during the appeal phase affected their finding that the dismissing officer, Mr Martin, acted reasonably in reaching his decision to dismiss the Claimant. Further, it is the Tribunal's view that the Claimant

suffered no disadvantage during that appeal stage, nor was his case before the Tribunal in any way prejudiced by the non-attendance of Mr Shannon to give evidence in person.

31. Finally, the Tribunal wishes to comment upon some confusion in relation to what was described as a "Disciplinary Case Report". The problem arose in the context of a proposition put forward on behalf of the Claimant that there had been an early decision to "close" the case, before "formal action" eventually went ahead. This derived from numerous references made to Bundle 331, where, in the fourth bullet point under "background information" there is an entry reading "therefore no case to answer is likely". Given that Miss Aly had, quite properly, pointed to this entry and suggested that it showed that a decision had been made not to proceed, the Tribunal sought clarification from the Respondent.

32. We are grateful to Miss Jacqui Hall, who kindly appeared at the beginning of Day 4 to explain the position – supported with a witness statement which was tendered under oath. On the basis of Ms Hall's evidence, and having heard other evidence subsequent to that explanation, the Tribunal came to the view that what was being described as the "Disciplinary Case Report" was, in effect, a sort of "running commentary" provided by the Respondent's external HR partner.

33. In relation specifically to the entry at Bundle 331, it appeared to the Tribunal that – notwithstanding the comment "therefore no case to answer is likely" – everything else pointed in the direction of nobody having made a decision to close the case at that stage and, indeed, it did go ahead. The Tribunal found it unfortunate that the entry had been put in (apparently, by the external HR partner), but we could clearly see from the contemporaneous notes and correspondence that no such decision was contemplated, and certainly not approved, by Miss Morgan at that stage or at any other stage.

34. In the light of that enquiry, the Tribunal certainly understood the points entirely properly raised by Miss Aly when she came to criticise the procedures undertaken by the Respondent, but formed the view that it was necessary to treat those entries with caution. As a consequence, the Tribunal has sought to rely primarily upon the attributable documentation in the Bundle, rather than upon the external "running commentary" making up the "Disciplinary Case Report".

35. One "silver lining" which emerged from consideration of the entry at Bundle 331, together with the evidence furnished by Miss Hall, was that it informed the Tribunal how the recording system worked. In particular, we could see (under the heading "case viewer") how and when various participants to the procedures were brought in from time to time. Indeed, the dates also served to show us when particular named individuals were given access to the database system which was operated by the HR external partner, and this helped to clear up some earlier confusion about who was the relevant individual driving the process on behalf of the Respondent.

36. Having dealt with those ancillary matters, the Tribunal restates its decision that the Respondent's decision to dismiss the Claimant was reasonable. **The unanimous decision of the Tribunal is that the Claimant's claim alleging Unfair Dismissal is dismissed.**

BREACH OF CONTRACT

37. This can be dealt with briefly. The claim relies upon an alleged breach of contract by the Respondent in terminating the Claimant's employment without notice.

38. For the reasons set out above, the Tribunal has already found that the dismissal of the Claimant was reasonable. In the course of undertaking that evaluation the Tribunal has been unable to see any breach of contract which could be attributed to the Respondent in these circumstances.

39. In the view of the Tribunal the termination of employment was undertaken in response to a repudiatory breach of contract committed by the Claimant. This lay in the gross misconduct of which he had been found guilty.

40. In the face of a repudiatory breach of contract, the innocent party (in this case the Respondent) is entitled to accept the repudiation by summarily rescinding the contract – which is precisely what they did by dismissing the Claimant without notice.

41. No notice was due, therefore, and the Respondent has not acted in breach of contract.

42. **The unanimous decision of the Tribunal is that the Claimant's claim alleging breach of contract is dismissed.**

DIRECT RACE DISCRIMINATION

43. It has already been mentioned that the Claimant initially described himself as being "Caribbean mix race", and then indicated that for the purposes of this litigation he should be described as "Black".

44. After discussion, it was agreed that the Claimant's claim is of unlawful discrimination by reference to the protected characteristic of race – specifically, by reference to "colour" within the meaning of Section 9(1)(a) of the **Equality Act 2010**.

45. The Claimant relies upon a number of comparators – and these are set out at pages 47-48 of the Bundle. This list was the Claimant's response to an order made by Employment Judge Burns at a Preliminary Hearing, where he was asked to clarify who were his comparators and what were the various circumstances of comparison. We can see a number of individuals named there, several of which are described as "white", although some of which are described as "black" and "Asian".

46. The problem we have with these comparisons is that the allegations set out at pages 47 and 48 of the Bundle appear to be allegations of treatment said to have been suffered by named individuals within the course of their employments. However, the problem for the Tribunal is that it is required by the **Equality Act 2010** to ensure that

there are relevant comparators and that the circumstances are properly comparable with those of Mr Wills.

47. The Tribunal is grateful to Miss Aly for the helpful way in which she made her submissions in relation to the race discrimination matter at paragraph 22 of her submissions. It would not be putting too fine a point on it to say that Miss Aly – very professionally – has taken a somewhat delicate approach to this. This is because it is extremely difficult to see who is being compared in relation to what allegations, and where the comparison can be drawn in relation to the Claimant. We have taken the submissions at their highest.

48. The problem that arises is that, while there are broad criticisms levelled at the Respondent (for example, not being able to find documents relating to what were said to be historical complaints), it still remains for the Claimant to establish (in shorthand terms) that there are comparators, that they are properly comparable, and that there are facts which he can establish that bring the "reversed burden of proof" provisions of Section 136 into play.

49. The Tribunal has also considered closely the submissions made by Miss Hoskin in her closing submissions on behalf of the Respondent. She takes the direct race discrimination matters from paragraphs 70-77 in her submissions, and deals with them generically, but also deals with the specific comparators (or claimed comparators) at paragraph 72 of her submissions. She makes the point (at paragraph 73) that the proposed comparators did not commit theft, or any misconduct involving dishonesty, and she then submits that, therefore, their circumstances are not relevantly similar. However, while that may go to the sanction, it does not necessarily follow in relation to the alleged generic behaviour or the alleged tainting by race – although the Tribunal recognises her argument.

50. Miss Hoskin also points out that no "hypothetical comparator" has been constructed – and that, of course, is the case here (it is specific incidents that are raised at Bundle 47-48) where the persons referred to appear allegedly to have been victims of bullying or some sort of verbal abuse.

51. The question for the Tribunal here is the so-called "first stage" of the test in Section 136 of the **Equality Act 2010** on the burden of proof. The correct approach to dealing with the burden of proof under Section 136 has been extensively considered at the level of the Court of Appeal, with, in particular, detailed evaluation (by reference to the statutory wording in force before the enactment of the **Equality Act 2010**), in the cases of **Igen v. Wong, [2005] EWCA 142** and **Madarassy v. Nomura International plc, [2007] EWCA Civ 33]**, and, after the coming into force of the **Equality Act 2010**, in **Royal Mail Group Limited v. Efobi, [2019] EWCA Civ 18**, subsequent to consideration of the issues afresh in **Ayodele v. Citylink Ltd, [2017] EWCA Civ 1913**.

52. This is what is accepted as being "a two-stage process", and has most recently been set out at para. 10 of the judgment of Sir Patrick Elias in **Royal Mail Group Limited v. Efobi, [2019] EWCA Civ 18**:

> **The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved.**

53. In this case, having regard to all of the evidence before us, and try as they may, the Tribunal cannot see how the facts established get anywhere near establishing the requisites of Section 136(2) such as to reverse the burden of proof. To adapt the later words of Sir Patrick Elias (at para. 59 of his judgment), in this case the Claimant's allegations of discrimination by reference to the protected characteristic of race (colour) are mere assertion and the Claimant has not backed up his claims with the necessary factual foundation.

54. It seems to us that all of the comparators set out at Bundle 47-48 suffer from major problems of relevant or appropriate comparability. The issues, for example, of food going missing in the place of work – which are dressed up as "theft" – bear no comparison with the conduct of which the Claimant was accused and found guilty in the light of CCTV evidence and a full investigation. Indeed, taking the Claimant's propositions at their highest, far from establishing less favourable comparative treatment, all the evidence seems to suggest that such matters – had they been raised at the time – would have been handled in exactly the same way as the allegation against the Claimant was handled. That is to say, there is a procedure set down for alleged theft (or wrongdoing/misconduct of that kind) and that would have taken matters through an "investigation phase". If, in the light of the investigation, it was decided that there was enough to go forward to "formal action", it would have moved to a "disciplinary hearing" stage, and then, if there had been an adverse outcome to the employee as a result of that, there would have been facility for an "appeal stage" to consider whether that outcome should be overturned. And that is exactly what happened to Mr Wills.

55. There is absolutely nothing in the evidence before us that any of these people would have been – had they been taken to task – treated in any other way than Mr Wills was treated. Indeed, we are grateful to Mr Addo and Mr Strampe (both senior and experienced trade union representatives) for explaining where the trade unions stood on this, and for making reference to the various procedures applicable. It has already been indicated that the Tribunal found those procedures to be clear, and found the procedures in and of themselves to be reasonable – bearing in mind that the members of the Tribunal have wide experience of disciplinary procedures operating across various sectors of the economy.

56. Taking all of the Tribunal's findings in the round, and even putting the Claimant's case most generously and at its very highest, the Tribunal is unanimously of the view that there have not been established any facts "from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred". The "first stage" of the Section 136 process is not satisfied, and **the Claimant's claim alleging unlawful discrimination by reference to the protected characteristic of race (colour) is dismissed.**

DISPOSAL

57. In the light of the above, the unanimous judgment of the Tribunal is that:

(1) The Claimant's claim alleging unfair dismissal is dismissed;

(2) The Claimant's claim alleging breach of contract is dismissed;

(3) The Claimant's claim alleging unlawful discrimination by reference to the protected characteristic of race is dismissed.

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Employment Judge Professor A C Neal

24th march 2023

Sent to the parties on:

28/06/2023

For the Tribunal:

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