



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107497/2022**

**Held in Glasgow 17, 18, 19 and 20 July 2023**

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**Employment Judge R McPherson  
Members: A McFarlane and R McPherson**

**Mr Adam Gorski**

**Claimant  
In Person  
[via Interpreter -  
Mr Zaborniak]**

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**Miller Fabrications Ltd**

**Respondent  
Represented by:  
Mr M Selwood -  
Counsel [Instructed by  
DAC Beachcroft]**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Employment Tribunal is that the claimant's claims in terms of s13, s26 and 27 of the Equality Act 2010 do not succeed and are dismissed.

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### **REASONS**

#### **Preliminary matters**

1. The claimant appeared in person via Interpreter Mr Zaborniak. The respondent was represented by Mr Sellwood Barrister.

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2. The claimant presented his claim to the Employment Tribunal on Tuesday 13 December 2022. Presentation of the ET1 followed upon ACAS conciliation which commenced Monday 22 August 2022 and in respect of which ACAS certificate was issued Monday 3 October 2022.

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3. In case management Preliminary Hearing on 7 March 2023 at which the claimant attended in person via an interpreter (Note of which was dated 7 March 2023 and issued to the parties 8 March 2023 -the PH Note) the Tribunal

5 identified an earlier hearing had been postponed and the claimant had been ordered to provide Further and Better Particulars which the claimant had subsequently provided in a document entitled "*List of Issues*" following upon which, the respondent had provided Amended Grounds of Resistance; that the respondent's draft List of Issues while not agreed, correctly set out the issues in the case and further made directions for the provision of joint file identifying not later than 14 days before the first day of the hearing, the parties shall liaise to lodge a copy of a joint file with the Tribunal, that if individual files were being used, each party must lodge its own file with the Tribunal. 10 Directions for using witness statements at the hearing were subsequently superseded and this Final Hearing proceeded by way of oral evidence.

- 15 4. There was a delay to the start of this Final Hearing as the Tribunal copies of the bundle prepared by the respondent did not arrive till after the scheduled start. However, the claimant had received his copy of that bundle on 10 July 2023 via email.
5. A second bundle provided by the claimant (headed by the claimant as Additional Bundle) was available from the start (the additional bundle).
6. The Additional bundle contained two documents which the respondent initially maintained objection to.
- 20 7. The first objected to document was described in the index as *Company Stance to ACAS*. This first document was an ACAS communication and was objected to as such by the respondent. The respondent did not consent to communication being admitted.
8. The second document issued to the claimant's then-representative was 25 described in the index as *Respondent Lawyer document sent to the Claimant Lawyer*. The respondent's objection arose out of the document being described as a without prejudice document issued after ET1 was presented. It was headed "*WITHOUT PREJUDICE SAVE AS TO COSTS*".
9. The claimant argued that both documents should be admitted.

10. In relation to the first document, while noting the claimant's position that it should be admitted, the Tribunal concluded that it fell within the terms of s18 (7) of the Employment Tribunals Act 1996 which provides "*Anything communicated to a conciliation officer in connection with the performance of his functions under [ any of sections 18A to 18C] shall not be admissible in any proceedings before an [ employment tribunal] except with the consent of that the person who communicated it to that officer.*" As the respondent did not consent to it being admitted, it was not admitted.
11. In relation to the second document, the respondent withdrew its objection at the outset of the second day and it was admitted.
12. The claimant additionally provided a video he made of himself working on-site around April to May 2022 which the Tribunal viewed as part of the claimant's evidence.
13. The Tribunal heard evidence from the claimant, his daughter Ewa Szarapow, and for the respondent George Brown the respondent's Nightshift Foreman, David Robuck a former employee of the respondent who was at the material time a nightshift plater (referred to by the claimant as David Plater) and David Smith the respondent's Production Director.
14. In the course of this hearing and following being referred to training document documentation signed by the claimant, the claimant withdrew the allegation set out in the ET1 (at paragraph 7) that he had not been trained on the use of the crane to move heavy pieces of metal.
15. Following the conclusion of the evidential element of the hearing on 19 July 2023 the respondent provided written submission on the morning of 20 July 2023 which document the interpreter interpreted to the claimant during the morning element of 20 July and following which the claimant, who was also assisted by his daughter provided his own written submission. Following the written submissions both parties indicated they did not wish to add to same, beyond the respondent reminding the Tribunal to have regard to the evidence.

16. Following an adjournment to consider both submissions the Tribunal issued unanimous oral judgment there being no request at that time for full written reasons. The claimant on 21 July issued a request for full written judgment and this full written judgment sets out the full unanimous decision of the Tribunal.
17. In this claim the claimant asserts three separate heads of claim:
1. s13 Equality Act 2010 (EA 2010) Direct Race Discrimination.
  2. s26 EA 2010 Harassment
  3. s27 EA 2010 Victimisation.
18. The claimant relies upon Ethnic or National Origins, s9(1)(c) EA 2010, the claimant is accepted to be of Polish origin.
19. The issues were identified to include the question of whether claim was presented in time:
20. While the respondent had given notice in the ET3 that it would argue that any acts alleged before **Wednesday 4 May 2022** were on the face of it out of time, at the outset of the Final Hearing it was confirmed that the respondent's position was that any complaint about something that happened before the later date of **Tuesday 2 August 2022** was potentially out of time and thus the Tribunal did not have the capacity to deal given the date the claim form was presented and the dates of early conciliation.
21. That is to say some claims were argued to have been lodged out with 3 months less one-day time limit (allowing for the operation of ACAS early conciliation). The provisions of section 207B of ERA 1996, since 2014, provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect initiating early conciliation "*stops the clock*" until the ACAS certificate is issued, and if a claimant has contacted ACAS within time, he will have at least a month from the date of the certificate to present his claim.

22. Issues which arose were the claimant's complaints presented within the time limits set out in Sections 123(1)(a) & (b) of EA 2010? Dealing with this issue involves consideration of subsidiary issues including whether there was an act and/or conduct extending over a period and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.
23. For this hearing, the Tribunal had regard to the relevant issues in respect of each asserted claim which are set out below. While the draft list of issues references an issue of whether the claimant was *unfairly dismissed* (at 2.14) as the claimant did not have two years' continuous employment there was no Ordinary Unfair Dismissal claim (in terms of s94 of Employment Rights Act 1996) nor was there any Automatic Unfair Dismissal claim. The issue in relation to termination was thus whether the termination was one in breach of the claims asserted.
24. For **s13 EA 2010**: direct race discrimination because of the protected characteristic of race, the issues for a Tribunal were:
- Has the respondent treated the claimant in the particular manner asserted? The claimant gave notice of events complained of allegedly occurring from the commencement of employment to termination of employment as listed in the Draft List of Issues.
  - Was that treatment "*less favourable treatment*", i.e., did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?
  - the claimant identifies three specific comparators known to him as Craig, John and Derek and is also understood to rely on hypothetical comparators.
  - If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?
25. For **s26 EA 2010**: harassment related to the protected characteristic of race relied upon, the issues were:

- a. did the events relied upon (from the commencement of employment to termination of employment as listed in Draft List of Issues) amount to harassment in terms of s 26 of EA 2010?
- b. In such a claim for harassment the Tribunal will consider whether that  
5 conduct was unwanted.
- c. If so, did that act relate to the protected characteristic relied upon?
- d. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 10 e. Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (Whether conduct has this effect involves taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)
- 15 26. For **s27 EA 2010**: victimisation, the relevant issues were:
- a. Were the protected acts the claimant relied upon, being the claimant's meeting on Thursday 4 May 2022 the respondent Production Manager Mr David Smith, and the subsequent presentation of a grievance protected acts? The respondent accepted (only) the presentation of  
20 the grievance as being a protected act.
- b. The alleged detriment complained of were alleged events from 19 July to dismissal on 4 August as listed in the Draft List of Issues.
- c. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done the protected act relied  
25 upon?

### Findings of Facts

27. The respondent is a supplier of structural steel, architectural metalwork and secondary steelwork to the UK construction, rail, and highway sectors. The

respondent who has operated for around 50 years employed around 140 employees at the material time and did not have an HR department.

28. The claimant who is a Polish national had been employed by the respondent for a short period in 2021, left due to his wife suffering from an injury and was re-employed by the respondent from **Monday 22 November 2021** to **Thursday 4 August 2022** as a nightshift Welder at the respondent's factory in Wishaw. The claimant was one of 4 employees on the Nightshift who were of Polish nationality all of whom worked under the supervision of foreman George Brown whom the claimant called Jordy.
29. As part of his role the claimant used consumables for welding and those were distributed to the claimant and other employees in the same manner on request.
30. The respondent Statement of Particulars provided to and signed by the claimant on **4 October 2021** set out that *"For all employees, it is a condition of employment that they shall be prepared to workday shift, night shift or back shift, either on a temporary or permanent basis, to suits needs of the business"* providing his night shift hours as "Monday to Thursday 7 pm to 7 am and Friday 7pm to 7 am" and described that the *"the company reserves the right to vary these hours should operational needs require it"*.
31. The claimant was provided with Induction Training signed for on **29 November 2021** which included health, safety and environmental training and specifically on the use of Overhead Cranes which included checking the path of travel to ensure the load is not being lifted above people, a question and answer session on Crane Training and on the use of Portable Grinders which included that the wheel guard operated as a guard (from parts of the element being ground spinning off) and was not to be held. The claimant was, as an experienced welder, aware that the wheel guard was not provided as a handhold, and that it would be dangerous to hold the grinder by same.
32. The respondent's Handbook set out in relation to **Disciplinary Procedures** that the purpose and scope of the procedure was *"designed to help and encourage all employees to achieve and maintain standard of conduct,*

*attendance and job performance”, that it applied to all employees and its aim was to “ensure consistent and fair treatment for all”. It further set out that no disciplinary action will be taken against an employee until the case has been fully investigated, at every stage in the procedure the employee will be*

5 *advised of the nature of the complaint against him or her and will be given the opportunity to state his or her case before any decision is made; at all stages the employee will have the right to be accompanied; employees will have the right to appeal and the procedure may be implemented at any stage, if the employee’s alleged misconduct warrants such action. It set out examples of*

10 *Misconduct and Gross Misconduct which included failure to comply with safety standards describing that neither list was exhaustive and described if accused of gross misconduct the employee “may be suspended from work, with pay, normally for no more than five days, while the Company investigates the alleged offence”; on completion of the investigation if the company is*

15 *satisfied that the gross misconduct had occurred, the result will normally be summary dismissal without notice or pay in lieu of notice. The procedure set out possible outcomes from recorded verbal warning, formal written warning, final written warning to dismissal and that as an alternative to dismissal the company “may consider” demotion or suspension without pay for a maximum*

20 *of one week, or both. It describes that “Should the matter be considered serious enough Management can go straight to a specific stage where appropriate.”*

33. In relation to **Grievances** the Company Handbook describes that its aim is to ensure a fair and systematic approach to the enforcement of standards of
- 25 *conduct and described at stage 1 that the employee shall in the first instance raise the matter with his/her supervisor/Foreman, a decision would be reached within 1 calendar week unless otherwise mutually agreed; at Stage 2 that if still unresolved that the grievance should be put in writing and submitted to the manager in writing “A hearing will be arranged, and a*
- 30 *decision reached within one calendar week, unless otherwise mutually agreed”; and Stage 3, if the matter was still unresolved a senior manager or director, would arrange a hearing a give a decision within one calendar week or as soon as reasonably practical thereafter with the decision being final.*



34. While the Company Handbook set out that smoking on the premises was forbidden subject to an exception during lunch break within the Designated Smoking Area, it did not describe that the prohibition included vaping.
- 5 35. All welders on the night shift worked on one of the metal elements of fabrication and then moved on to the next piece of fabrication when that was completed. There was no system whereby the nightshift foreman allocated any specific element to any employee including the claimant. Mr Brown, in his role as foreman had on occasion advised the claimant he was spending too long on a job.
- 10 36. The lightest of the metal element weighed around 600 kg. The foreman did not direct the claimant to turn any of the elements by hand and without the use of a lifting crane nor did the foreman suggest to the claimant that this was something the claimant could do.
- 15 37. In the first month of the claimant's employment Mr Robuck, on one occasion when looking to gain the claimant's attention employment across the noisy workshop environment, shouted "yo" to the claimant. This was a term Mr Roebuck used for other colleagues and was not deployed in connection with the claimant's nationality. The claimant requested that Mr Robuck did not use that term and deployed the claimant's name which request Mr Robuck agreed to and he did and he did not use that term for the claimant subsequently.
- 20 38. Subsequently Mr Robuck intervened on one occasion when he saw the claimant holding the grinder wrongly; specifically, the claimant had one hand on the grinder and the other hand not on the handle but rather on the wheel guard, dangerously close to spinning by describing that the claimant's actions were incorrect. Mr Robuck who knew that the claimant was an experienced welder asked whether the claimant had been trained in Poland. Mr Robuck did so in the context of asking why the claimant would consider holding the grinder by the wheel guard acceptable. The claimant did not complain at the time as to Mr Robuck's intervention or the question put.
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39. On **Thursday 14 April 2022** the respondent notified the claimant that they had commenced a redundancy process, the respondent anticipated that the programme would affect welders such as the claimant.
40. On **Tuesday 3 May 2022** while the claimant was based in the heavy fabrication workshop the claimant and some other colleagues had encountered an issue with the crane, they were not progressing work. Mr Brown as the claimant's foreman identified that the claimant had not completed the available work and spoke to the claimant directing the claimant should get on with the available work, as he would and did direct any other employees. The foreman did not shout at the claimant.
41. On **Wednesday 4 May 2022** the claimant met with the respondent's production manager David Smith referencing the interaction with his foreman on 3 May, he did not suggest that the claimant's nationality was a factor.
42. On **Thursday 12 May 2022** the respondents notified the claimant that there would be no redundancies of employees at that time including the claimant.
43. On **Tuesday 19 July 2022** the claimant identified to his foreman that the claimant's protective overalls were torn, the foreman promptly and without delay arranged for a replacement set of the protective overalls to be provided. The claimant however on receiving the same did not wear them, rather he elected to take them home to arrange to wash them to reduce what the claimant regarded an odour from the new protective overalls.
44. On **Thursday 21 July 2022**, the claimant's foreman noted that the claimant was not wearing the new set of protective overalls and spoke to the claimant directing that he should ensure that he did so. While the foreman directed the claimant that he should wear the provided protective overall he would have issued the same direction to any employee for their own protection and did not snap at the claimant.
45. On **Thursday 28 July 2022**, the claimant having indicated to his foreman that he was uncertain how to operate controls for the crane, was directed to directions on the wall, at this time the foreman was unaware that the

respondent had changed the controls for the crane. The foreman walked away, and the claimant's colleague Mr McGhee successfully operated the crane without issue.

5 46. The foreman having identified that the claimant was again holding the grinder in an unsafe manner by holding the wheel guard identified this to the claimant, he did however not shout at the claimant nor speak to the claimant in a disrespectful, aggressive, and humiliating way.

10 47. The claimant attended his GP on **Monday 1 August 2022** who signed the claimant off for a period of 2 weeks due to stress. The GP subsequently provided a Fit Note on Thursday 4 August 2022 which confirmed that the claimant was not for work for the period Monday 1 August to Sunday 14 August 2022.

48. On **Tuesday 2<sup>nd</sup> August 2022:**

15 1. at 12.44 am the claimant issued an email to the respondent headed "*Absence from work*" to the respondent which set out "*I will be absent from work this week, I will send a fit note later on.*"

20 2. At 1.09 pm David Smith the respondent's Production Manager replied "*Adam, Can you come up to work for a meeting.*" That email did not set out the reason for the requested meeting, it was however to discuss concerns raised primarily regarding the claimant's use of the hand grinder.

3. At 1.39 pm the claimant responded "*Hi David, I feel unwell today we can meet tomorrow.*"

25 4. At 1.48 pm the Production Manager responded "*Hi Adam, as soon as you are able to make it.*"

49. On **Wednesday 3<sup>rd</sup> August 2022:**

1. at 9.53 am the Production Manager followed up on his emails of 2 August with "*Adam Can you come and see me today.*"

2. At 1.40pm the claimant responded *“Hi David, Sorry that we cannot meet today, but I still feel unwell. I will definitely meet you tomorrow. Please let me know what time I need to come to meet you, what time suits you best.”*
- 5 3. At 2.06 pm the Production Manager replied *“Adam, I can confirm that you are working dayshift from Monday 8<sup>th</sup> August”*.
50. On **Thursday 4 August** at around 9.30 am the claimant attended the respondent workplace with his daughter and hand-delivered a grievance which he left at the respondent’s reception desk and which the claimant followed up with an email copy at 10.11 am after he returned home. It was not  
10 the respondent’s policy to acknowledge any grievance and they did not do so.
51. The grievance letter was 7 pages long and set out what the claimant set out as criticism of the respondents including allegations that:
  1. on **Tuesday 19 July 2022** the claimant had gone to his supervisor to get a new uniform (i.e., protective overall) and was ignored, on  
15 **Wednesday 20 July 2022** his supervisor (Mr Brown) indicated there was no chance of the same but asked the claimant’s size.
  2. on **Thursday 28 July 2022** the claimant criticised his supervisor (Mr Brown) for directing the claimant to a wall instruction for controls for the crane, to which the claimant set out he replied that the instruction  
20 was for a differently coloured control and described that the supervisor did not reply and left following upon which the claimant’s colleague Mr McGhee operated the crane (successfully) via the control.
  - 25 3. An occasion when a colleague Mr Robuck (who he described as David Plater) told the claimant, that the claimant was holding the grinder incorrectly. The claimant who did not refer to the induction training suggested, in the grievance, that the claimant had responded that the manual for the grinder did not direct how to hold  
30 the grinder and described that he had been working with grinders

for around 30 years, the claimant alleged Mr Roebuck replied ironically, full of sarcasm "*where in Poland?*" to which the claimant replied Yes, in Poland, Germany and the Netherlands. The claimant described that after speaking further the claimant considered their relationship returned to normal describing that interaction as a short conversation.

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4. The claimant further set out criticism of the claimant's supervisor including an uneven distribution of work, what the claimant described as a hand injury after the Christmas Break and what the claimant suggested was an inconsistent approach, as compared with (unspecified) colleagues who were provided, he suggested with consumable parts (such as contact tips) while he was only provided with same on request including on **28 July 2022** the supervisor (Mr Brown) required sight of welding mask Plexiglass for it to be replaced when (for the Plexiglas) this had not been the position before that date.

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52. The respondent's receptionist was aware that the Production Manager wished to meet with the claimant and upon the claimant arriving and delivering the grievance directed that the claimant should attend the Production Manager's office. The meeting had not been pre-arranged. The grievance was left at the reception desk. It was not passed to the Production Manager before or during the meeting.

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53. The claimant's daughter attended along with the claimant at the meeting with the Production Manager. No minute of the meeting was prepared. The meeting lasted around 15 minutes. The claimant's daughter recalls only the Production Manager identifying that her father would require to move to dayshift (as the Production Manager had already described in his final email on the preceding day), something to which the claimant objected (the claimant considered his Statement of Particulars identified that he was a nightshift welder and did not permit such a change). The Production Manager identified that the reason for transfer to the day shift was that the respondent had what were serious health and safety concerns principally around the unsafe use of

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the hand grinder and that the respondent considered it would have more capacity to supervise and direct the claimant to reduce those concerns. Further but secondary concerns related to the use, by the claimant of vapes which were said not to be permitted on site. While the respondent had provided induction training including on the safe use of hand grinders it had not provided any directions on the use of vapes. By the conclusion of the meeting the claimant had refused what the Production Manager considered was the only option available, being transferred to the day shift allowing for greater supervision given concerns about the claimant's unsafe handling of the grinder.

54. The claimant in his email of **10.11 am** that day providing further copy of the Grievance did not make any reference to the meeting with the Production Manager including the direction by the Production (which the claimant objected to) that the claimant when he returned to work did so on the day shift.
55. After the meeting the Production Manager became aware of the grievance and rapidly carried out an investigation speaking to **Craig McGhee** Night Shift Welder, who was named but not criticised in the Grievance along with the claimant, **David Robuck** who the claimant names as David Plater, and **George Brown** the Nightshift Foreman. The Production Manager concluded his investigation that day and rejected the grievance. The Production Manager did not conduct the Grievance in accordance with the Company Handbook he did not offer a meeting with the claimant to discuss the Grievance as set out in the Company Handbook. The Production Manager did not operate to the Company Handbook due to what he regarded as the seriousness of the health and safety issue surrounding the claimant's unsafe handling of the grinder.
56. The Production Manager did not state in writing that he rejected the grievance nor set out in writing his reasons for doing so.
57. At around **5.13 pm** the Production Manager phoned the claimant to advise that having reflected on matters around the respondent's concerns on the use of the grinder (which the respondent had initially considered they could address via increased supervision on the day shift), they were terminating the

claimant's employment. The decision to terminate the claimant's employment was that of the Production Manager alone, the decision was due to the respondent's concerns regarding the claimant's use of the hand grinder and would have been applied to any comparable employee. The Production Manager advised that the claimant would be paid 7 days' pay in lieu of notice. The Production Manager referred to as a secondary matter what had been reported as the claimant's use of vapes. The use of vapes which was not disputed was not a determining factor in the respondent's decision.

58. The claimant requested that the Production Manager put it in writing and the Production Manager responded to that request with a short email that day at **5.28 pm** which set out "*Further to our conversation I can confirm we are terminating your employment of immediate effect due to you being unsuitable for the position of Welder. You will finish immediately and be paid 1 weeks' notice and any holiday pay due.*" The Production Manager's reference to the claimant not being suitable as a welder was a reference to the respondent's health and safety concerns arising from the manner in which the respondent had identified that the claimant had been holding the hand grinder, in particular dangerously holding the grinder by the wheel guard. While the Production Manager anticipated that the respondent would write to the claimant confirming the termination, the respondent did not do so and did not notify the claimant of his right to appeal. The claim did not present an appeal.

59. Subsequent to the termination of the claimant's employment on Thursday 4 August 2022 the claimant did not seek to explore whether he could secure any alternative employment as he considered that alternative employers would not take him on in any capacity pending the claimant attending a consultant in connection with his hand.

### Submissions

60. The claimant provided a detailed written summary of his position including an overview, his position on the issues, and background together with an extract of the ACAS Code of Practice, the respondent Company Handbook referencing both the Grievance Procedure (arguing there was a failure to

follow both the company process and ACAS code) and Disciplinary Procedure setting out that the reason for dismissal given to him on the phone was improper dangerous use of the grinder and vaping which was prohibited. In relation to the dismissal the claimant argued that he should have been notified  
5 of the right to appeal and he believed that the respondent had discriminated, and subjected him to unequal treatment, harassment, and victimisation because of his race. The claimant also provided a summary of the Smoking, Health and Social Care (Scotland) Act 2005 (which he had provided in the Additional Document bundle) and referenced the Company Handbook on  
10 Smoking. In addition, he provided a description of what he indicated were inaccuracies in the respondent's testimony pointing to the respondent's amended grounds of resistance and to evidence of Mr Smith in cross who he noted described that the claimant was dismissed for gross misconduct noting the amended grounds of resistance described the termination as due to  
15 misconduct and argued that he first learned of the allegations in the ET3.

61. The respondent provided an overview together with a summary of the relevant legal framework in relation to s13, s26 and s27 EA 2010 and the burden of proof together with confirmation of the respondent's position on time as set out at the commencement of the hearing. In relation to witness credibility  
20 reference was made to a previous decision by a different Tribunal in a claim brought by the claimant Gorski v Allied Vehicles [2018] ET 4100816/2017. while noting the respondent's position the Tribunal did not consider a review of the decision helpful or relevant in consideration of the separate factual matrix of this case. Further, the respondent set out its position on the issues  
25 taking each in turn, noting that the allegation that employees other than the claimant were provided with consumables and PPE more than one piece at a time was withdrawn, setting out the respondent's position that each issue should be rejected in relation to s13, s26 and s27 EA 2010 and further set out the respondent's position on remedy. The respondent while critical of the  
30 claimant on mitigation did not suggest that it had adduced evidence of available roles.



**Conclusions on witness evidence**

62. The Tribunal heard evidence from the claimant and his daughter Ms Szarapow. The Tribunal concludes that the claimant's recall of events was impacted by his perception of the respondent. The Tribunal concludes that the claimant's daughter was honest in her recollection of matters within her knowledge, subject to the qualification that the Tribunal concludes that Mr Smith's recall of the informal meeting she attended on Friday 4 August was more accurate and is preferred. In the absence of a detailed note/ or minute having been provided, it is understandable that her recollection of what was said was honestly but inaccurately recalled. The Tribunal found the evidence of Mr Robuck to be wholly reliable and straightforward. The Tribunal found the evidence of Mr Brown straightforward and found the evidence of Mr Smith to be reliable.

**Relevant Law**

63. For the sake of brevity is not considered necessary to set out the provisions of s13 (Direct Discrimination) and 26 (Harassment) of EA 2010.

64. In relation to Victimisation, s27 of the EA 2010 provides.

*27 EA 2010 Victimisation*

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a) B does a protected act, or*

*(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act—*

*(a) bringing proceedings under this Act;*

*(b) giving evidence or information in connection with proceedings under this Act;*

- (c) *doing any other thing for the purposes of or in connection with this Act;*
- (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*
- 5 (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
- (4) *This section applies only where the person subjected to a detriment is an individual.*
- 10 (5) *The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

65. In relation to s27 EA 2010 is for the employee to be able to show that they have made an allegation that someone contravened the Act (within s27(2)(d) EA 2010), it must be clear from the words used and their context that such an  
15 allegation is being made.

### **Burden of Proof Discrimination Claims**

66. **s136 (1) to (3) of EA 2010 (the burden of proof provisions)** set out:
- “(1) *This section applies to any proceedings relating to a contravention of this Act.*
- 20 (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. “*
- 25 67. In **Madarassy v Nomura International plc** [2007] IRLR (Madarassy) Mummery LJ held at [57] that ‘*could conclude*’ [The EA 2010 uses the words ‘*could decide*’, but the meaning is the same] meant: ‘*[...] that “a reasonable Tribunal could properly conclude” from all the evidence before it.*’

68. However, a simple difference of treatment is not enough to shift the burden of proof, something more is required: **Madarassy** per Mummery LJ at para 56: *‘The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.’*

## **EHRC Code of Practice**

### **The Statutory provisions**

69. s15 (4) of Equality Act 2006 provides that, the EHRC 2011 Statutory Code of Practice of, shall be taken into account, wherever it appears relevant to the Tribunal to do so. The Tribunal has taken into account the EHRC 2011 of practice where it appears relevant to do so.

## **ACAS Code of Practice**

70. Section 207 of the Trade Union and Labour Relations Consolidation Act 1992 (TULR(C)A) 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.”*

71. Section 207A TULR(C)A provides that:

*“(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*

*(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

*(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

(b) *the employer has failed to comply with that Code in relation to that matter, and*

(c) *that failure was unreasonable,*

5 *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

(3) *If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*

10 (a) *the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*

(b) *the employee has failed to comply with that Code in relation to that matter, and*

(c) *that failure was unreasonable,*

15 *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%*

(4) *In subsections (2) and (3), “relevant Code of Practice” means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes*

20 (5) *Where an award falls to be adjusted under this section and under section 38 of the Employment Act 2002, the adjustment under this section shall be made before the adjustment under that section.”*

72. The ACAS Code of Practice on Disciplinary and Grievance Procedures (*the ACAS Code*) came into effect in 2015 provides, in relation to Disciplinary Procedures;

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1. *This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.*

- *Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.*
- 5
- *Grievances are concerns, problems or complaints that employees raise with their employers.*
2. *Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear... It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used.*
- 10
3. *Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.*
- 15
4. *That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:*
- 20
- *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*
- 25
- ...
- *Employers should carry out any necessary investigations, to establish the facts of the case.*

- *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*
- *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*
- *Employers should allow an employee to appeal against any formal decision made.*

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32... *employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance This should be done in writing and set out the nature of the grievance*

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33. *Employers should arrange a formal meeting to be held without unreasonable delay after a grievance is received.*

73. The ACAS Guidance on the Code in relation to Discipline and Grievance Procedure (*The ACAS Guidance*) sets out that a “*Tribunals will be able to adjust any award upto 25% for any unreasonable failure to comply any provision of the Code*”

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### **Discussion and Decision**

74. On the question of whether some of the allegations were out of time, the Tribunal considers that in the context the claimant had not awaited the outcome of the grievance, the factual allegations listed in the Draft List of Issues as 2.1 to 2.4 and 2.6 and 2.7 were said to have occurred throughout the claimant’s employment, the respondent had prior to the hearing given notice that only those events occurring before 4 May 2002 were potentially out of time and in any event there was close temporal proximity between the events and the limited number of individuals involved it is just and equitable to extend time. The Tribunal was satisfied that extending time, on the factual matrix, in this case, did not in fact place the respondent at a disadvantage.

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75. The Tribunal has considered each of the separate heads of claim in relation to alleged race discrimination.

76. The Tribunal has considered the claimant's claim in terms of s13 of EA 2010: direct discrimination because of a protected characteristic of race.

5 a. The alleged treatment relied upon was as set out above. It is considered useful to summarise for the sake of brevity the Tribunal's factual conclusions so far as relevant to the claims:

10 1. From the beginning of the claimant's employment Mr Brown, the claimant's foreman was not short with the claimant and did not refuse to engage with the claimant the same as the claimant's colleagues.

2. Throughout the claimant's employment Mr Brown was not unfairly critical and supportive of the claimant,

15 3. Throughout the claimant's employment Mr Robuck did not shout "*hey you*" at the claimant. He shouted to the claimant using the term "*yo*" on one occasion.

20 4. In June/ July 2022 Mr Robuck did not criticise the claimant's work and insinuate that the claimant's Polish experience was less valuable. Mr Robuck on one occasion, in the context of, being concerned at the claimant's unsafe use of the grinder asked whether the claimant had been trained in Poland.

5. Throughout the claimant's employment Mr Brown did not provide the claimant with more work than the claimant's colleagues.

25 6. Throughout the claimant's employment Mr Brown did not instruct the claimant to use his hands instead of/as opposed to using the crane.

7. On 3 May Mr Brown did not shout at the claimant

8. On 19 July Mr Brown did not ignore the claimant's uniform request.
9. On 21 July Mr Brown did not snap at the claimant because the claimant was not wearing the new uniform
- 5 10. On 28 July Mr Brown did not ignore the claimant's request to show the claimant how to use the crane and did not shout at the claimant when the claimant asked how to use it.
11. On 28 July Mr Brown did not shout at the claimant and speak to him in a disrespectful, aggressive and humiliating way.
- 10 12. The respondent did not fail to investigate the claimant's grievance of 4 August.
13. The termination of the claimant's employment on 4 August 2022 was due to the respondent's health and safety concerns.
- 15 b. The Tribunal has considered whether the respondent treated the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances.
- c. It was not suggested that any other employee had been or would have been treated differently. On the evidence before the Tribunal on each  
20 instance, the respondent did not treat the claimant less favourably than it treated or would have treated others (actual or hypothetical comparators) in not materially different circumstances.
- d. The Tribunal concludes that in each instance the treatment  
25 complained of so far as that treatment was accepted it was not due to the claimant's race and/or because of the protected characteristic of race more generally, the termination of employment was due to respondent health and safety concerns. The respondent in each instance did not treat the claimant less favourably than it treated or



would have treated others (actual or hypothetical comparators) in not materially different circumstances.

e. The claimant's claims in terms of s13 EA 2010 do not succeed.

- 5 77. The Tribunal has considered the claimant's claim in terms of s26 of EA 2010, harassment because of a protected characteristic of race.
- 10 78. For the sake of brevity, it is not considered necessary to set out the Tribunal's factual conclusions however and in so far as the Tribunal has found that an event had occurred as set out above including the use by Mr Robuck of the term "yo" on one occasion and further Mr Robuck on one occasion, in the context of, being concerned at the claimant's unsafe use of the grinder asking whether the claimant had been trained in Poland in each instance the Tribunal concludes that conduct was unwanted.
- 15 79. In each instance, however, with the exception of Mr Robuck asking in the context of the claimant's unsafe use of the grinder whether the claimant had been trained in Poland, the conduct did not relate to the protected characteristic of race.
- 20 80. In relation to that one instance, asking whether the claimant had been trained in Poland did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was a genuine question raised in the context of what was identified as an unsafe practice and was responded to as such. The Tribunal in this regard has had regard to the claimant's perception including at the time of the comment, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
- 25 81. The claimant's claims in terms of s26 EA 2010 do not succeed.
- 30 82. In relation to s27 Victimisation, the claimant's meeting with the Production Manager on 4 May was not a protected act, the claimant in that meeting did not suggest that his protected characteristic was a factor. The respondent accepts that the presentation of the Grievance on 4 August was a protected act. The respondent did not however fail to investigate the claimant's

grievance of 4 August, and this did not amount to a detriment. The termination of the claimant's employment was due to the respondent's health and safety concerns and the Tribunal concludes that the termination of employment was not because the claimant did the protected act (or believed that the claimant had done the protected act relied upon).

83. The claimant's claims in terms of s27 EA 2010 do not succeed.

#### **Other matters**

84. The Tribunal noted that the respondent withdrew its objection to the document listed in the additional documents as Respondent's Lawyer document sent to Claimant's lawyer. The letter was headed Without Prejudice save as to costs. While no application was made in the course of this hearing as to its contents, in so far as the withdrawal of the objection was understood to foreshadow a potential application in terms of Rules 75 and 76 of the 2013 Rules, at this stage pending any further application in terms of those Rules the Tribunal is not satisfied that there was an unreasonable distorted perception of matters on the part of the claimant in the bringing of this claim. He was not told of the reason for the request for the meeting which ultimately took place on 4 August. He had between the meeting and the outcome telephone call presented a Written Grievance which he anticipated would result in a meeting. He was not given any written notification of the outcome. In relation to the termination of his employment beyond the email intimating that he was not suitable – no mention was made of misconduct nor gross misconduct; he received his one week's notice pay – he was not advised in writing that the reason for termination was the incorrect holding of the grinder. He was not advised of any right to appeal.

**Conclusion**

85. The claimant's claims do not succeed and are dismissed.

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**Employment Judge: R McPherson**  
**Date of Judgment: 11 August 2023**  
**Entered in register: 14 August 2023**  
**and copied to parties**

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