



EMPLOYMENT TRIBUNALS

Claimant: Mr Zahir Zaman

Respondent: Mitie Limited

Heard at: Midlands West Employment Tribunal

On: 10 – 12 July & 5 – 6 September 2023.

Before: EJ Murdin, sitting with Mr N Forward & Mr T Liburd.

Representation

Claimant: Mr Khalil (Lay representative)

Respondent: Mr Mortin (Counsel)

JUDGMENT

1. The Claimant's claim for unfair dismissal is dismissed.
2. The Claimant's claim for direct discrimination is dismissed.
3. Save where otherwise stated, page numbers referred to are the page numbers of the Joint Bundle used by the Tribunal at trial.
4. By way of an ET1 dated 11th February 2022, which can be found at page 2, the Claimant brings claims for unfair dismissal and direct discrimination on the grounds of race.
5. Those claims are denied through an ET3 dated 15th March 2022 (page 28), and in Grounds of Resistance (page 36).

6. The matter came before the Tribunal on 31st August 2022, when EJ Algazy KC conducted a preliminary hearing by telephone. The complaints are set out at paragraph 41 of his Order (page 54) and the Issues are set out at paragraph 42 (page 55).

The Background

7. The Claimant began his employment with the Respondent in July 2007. His role, by the time of his dismissal, was Security Operations Manager.
8. It is agreed that, on 25th August 2021, the Claimant took 2 bicycles from his place of work, the Respondent's premises. The 2 bicycles had been in lost property for over a year.
9. On 15th September 2021, the Claimant returned to work after a period of absence. He was spoken to about the above incident, and was suspended by Paul Thompson, Security Contracts Manager, the Claimant's line manager.
10. On 17th September 2021, the Claimant was invited to a disciplinary hearing which eventually took place on 25th October 2021. The recommendation to proceed the matter to a disciplinary hearing was taken by Mr Thompson.
11. Following issues raised in that disciplinary hearing, a second investigation meeting was held on 8th November 2021 with the Claimant.
12. He was dismissed on 18th November 2021 by Roger Pearce, then Account Manager (North).
13. The Claimant appealed the decision to dismiss him on 27th November 2023.
14. ACAS received the EC notification on 24th December 2021, and issued the certificate on 3rd February 2022.

15. The matter came before the Tribunal on 10-12 July 2023, when evidence and submissions were heard. The Tribunal reconvened on 5th September to consider its deliberations, and reach its conclusions, which were delivered in written form on 6th September 2023.

The Claim

16. The Claimant alleges that he was unfairly dismissed and directly discriminated against, on the basis of his race. The Claimant identifies as a black man, of Pakistani origin.
17. He admits that he took the 2 bicycles, but avers as follows that:
 - (i) he had raised the issue of the bikes with Olivia Shirley (who organises charity sales) prior to taking them;
 - (ii) he intended to make a contribution towards charity.
18. He alleges that he was unfairly dismissed for the following reasons:
 - (i) he was interviewed on the day that he returned to work after a 3 week absence;
 - (ii) following that initial interview, he was suspended, which demonstrated that the Respondent had predetermined the matter;
 - (iii) that suspension denied the Claimant the opportunity to return the bicycles and/or to make a contribution;
 - (iv) he should have received an investigation report, and did not;
 - (v) key witnesses, namely Olivia Shirley and Warren Greatrex, were not interviewed;
 - (vi) no witnesses were called to the disciplinary hearing;
 - (vii) his motives were not considered;
 - (viii) his previous good conduct was not considered;
 - (ix) a lesser sanction was not considered;

19. He further alleges that he was directly discriminated against on the basis of his race for the following reasons:
- (i) he was treated less favourably in comparison to Anthony Doherty and Richard Earl;

The Response

20. The Respondent denies that the Claimant was unfairly dismissed and/or discriminated against. They rely on their investigation, disciplinary process, and appeal, which they aver were fair, and in accordance with their policies and procedures. They further claim that the sanction of dismissal was both fair and reasonable. Alternatively, they rely on contributory fault and/or *Polkey*.
21. The Respondent also denies the claim for discrimination. They allege that the circumstances of the comparators identified by the Claimant were materially different. They further aver that the Claimant was not treated less favourably than the named comparators, and alternatively if he was treated less favourably, it was not because of the Claimant's race.

The Evidence

22. The Claimant relies upon the documentation contained within the trial bundle and his witness statement dated 12th January 2023. He also gave oral evidence.
23. His oral evidence was consistent with his witness statement. He confirmed that he had taken the bicycles on 25th August 2021, having discussed the matter earlier with Olivia Shirley. He was aware of the Lost Property Procedure (page 76), and accepted that he was in a position of trust. The bikes had not yet been the subject of a charity sale, and he accepted that, as of 15th September 2021 when he returned to work, he had not yet made a financial contribution. He intended to

contribute when a sale took place, although he had not told anyone that fact after having taken the bikes.

24. He accepted there was no obligation to provide an investigation report and accepted that Paul Thompson had the power to suspend him. He said the suspension was not necessary and amounted to overkill. He thought he had done the right thing by speaking to Olivia. He realised in hindsight that he should have spoken to Paul Thompson.
25. The Respondent relies upon the documentation contained within the trial bundle and the addendum trial bundle, together with the witness statements of Paul Thompson dated 14th February 2023, Roger Pearce dated 13th February 2023 and Gary Malloy dated 14th February 2023.
26. Mr Thompson and Mr Mallor also gave oral evidence, which was consistent with their witness statements.

Submissions

27. Both parties made oral submissions in accordance with their pleaded cases. The Respondent also sought to rely on written submissions.

Findings of Fact

Unfair Dismissal

28. It is agreed that the Claimant was dismissed on 18th November 2021.
29. Pursuant to section 98(1) of the Employment Rights Act 1996, it is for the Respondent to prove the reason(s) for the dismissal, and thereafter, to prove that reason was potentially fair.

30. The Respondent avers that the reason for dismissal was conduct, which is a potentially fair reason pursuant to section 98(2)(b) of the Employment Rights Act 1996.
31. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct, and whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?
32. The Tribunal will decide, in particular, whether:
 - (i) there were reasonable grounds for that belief;
 - (ii) at the time the belief was formed the respondent had carried out a reasonable investigation;
 - (iii) the respondent otherwise acted in a procedurally fair manner;
 - (iv) dismissal was within the range of reasonable responses.
33. The Tribunal has determined that there were reasonable grounds for the Respondent to form the belief that the Claimant had committed misconduct. It was accepted that the Claimant removed the bicycles from the work premises, and that he did so, without the permission of his line manager, and in breach of the Respondent's policy, of which he was aware.
34. Whilst the Claimant relied on his conversation with Olivia Shirley, the Tribunal notes that she was the Claimant's subordinate and reported directly to the Claimant. There had been no payment forthcoming in the period since he had taken the bicycles, nor had there been any communication from the Claimant regarding the bicycles. It would have been easy for the Claimant to let Mr Thompson know that he had taken the bikes, and that he would be making a contribution to charity upon his return. There was no communication of any sort, and whilst the Tribunal takes into account the fact that the Claimant was on leave, and had recently, or was about to, become a father again, any such electronic communication could have undertaken very quickly.

35. Furthermore, at the time that belief was formed, it is the view of the Tribunal, that the Respondent had carried out a reasonable investigation. That investigation was set out in the evidence of Mr Paul Thompson, both in his statement at paragraphs 4.1 – 4.23, and in his oral evidence.
36. Mr Thompson was a consistent and credible witness. He gave evidence entirely in accordance with his statement. His investigation was thorough and careful. We reject any notion that it was predetermined.
37. We further reject the Claimant's contention that Olivia Shirley was not interviewed, as she plainly was, and those notes can be found at page 113. It was also alleged by the Claimant that her evidence may have been motivated by a desire to gain revenge on the Claimant as he had previously conducted a disciplinary process against her.
38. Save for the Claimant's suspicions, there is no evidence to support this contention. We further note that there was ample undisputed evidence upon which the Respondent could and did rely to reasonably form a genuine belief that the Claimant had committed misconduct.
39. We further conclude that both the disciplinary and appeal processes were procedurally fair. The details of those processes was set out in the evidence of Mr Roger Pearce in his statement at paragraphs 3.1 to 3.33 and Mr Gary Malloy, both in his statement at paragraphs 3.1 – 3.16.7, and in his oral evidence. Mr Malloy was also an impressive and consistent witness.
40. The Claimant did not make any specific criticisms of the procedure followed in either the disciplinary or the appeal process. Nevertheless, having considered the detailed manner in which both processes were followed, the Tribunal has concluded that both processes were clearly procedurally fair and reasonable.

41. The Claimant submits that the sanction imposed was too severe, and that he should not have been dismissed. Specifically, the Claimant avers that his motives and previous good conduct were not considered, and a lesser sanction would have sufficed.
42. We remind ourselves, that it is not for the Tribunal to determine the appropriate sanction for the Claimant. Rather, we must stand back and consider whether the Respondent's sanction was within the range of reasonable responses.
43. In particular, and whilst we have taken into account the Claimant's reasonable and helpful submissions, we have also considered both the seniority of the Claimant, and the industry in which he was employed. We have reminded ourselves that he had neither made any payment in respect of the bicycles prior to returning to work, nor communicated with Mr Paul Thompson at all.
44. In those circumstances, we have concluded that the Respondent's sanction of dismissal was within the range of reasonable responses.
45. The claim for unfair dismissal therefore fails, and is hereby dismissed.
46. We do not therefore need to consider the Respondent's alternative submissions in relation to *Polkey* and contributory fault.

Discrimination

47. Prior to considering the substantive claim for discrimination, the Tribunal first has to consider whether all or part of that claim has been brought outwith the statutory time-limits.

48. The relevant statutory provision in respect of the claims is set out in s.123 The Equality Act 2010:

s123 Time Limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable...

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.”

49. The original limitation date is subject to the ACAS Early Conciliation period which extends time for presentation of the claims pursuant to s.140B EQA.
50. The Respondent avers that the acts complained of do not amount to a course of continuing conduct, and time should not be extended.
51. In response, the Claimant relies on his status as a litigant in person, the fact that the acts took place over a short period of time, and submits that it would be fair to extend time.
52. The Tribunal agrees with the Claimant on this issue. Whilst the acts do not constitute a course of continuing conduct, as they are not unlawful, we have

exercised our discretion to extend time. Whilst we have reminded ourselves, that our discretion should only be extended in exceptional circumstances, we have taken into account the fact that the Claimant is a litigant in person, that the acts did indeed all occur within a short space of time, and the fact that time will not have to be extended for a lengthy period.

53. Furthermore, we do not consider that the Respondent will suffer any prejudice as a consequence of this decision. They have been able to call and rely upon the relevant evidence, and its cogency has not materially been affected. For all of those reasons, we extend time.
54. In terms of the substantive claim for discrimination, we have reminded ourselves of the Issues contained within Judge Algazy KC's Order, set out at page 56.
55. We have concluded that the Respondent did not directly discriminate against the Claimant as a result of his race.
56. Whilst it is correct that the Respondent suspended the Claimant and eventually dismissed him, he was not, in any way, treated less favourably than the 2 comparators identified by the Claimant.
57. The Tribunal agrees with the Respondent that the circumstances of 2 comparators identified by the Claimant were not materially the same as the Claimant. Whilst both situations involved thefts of a relatively low value, the comparators were significantly less senior than he was, which can reasonably lead to a difference in treatment. In fact, neither occupied a position of authority in contrast to the Claimant.
58. Furthermore, Mr Doherty resigned on the day that his investigation began.
59. The Tribunal has also concluded that the Claimant was not treated less favourably than any hypothetical comparator. Given his seniority, his profession, and the

circumstances of his dismissal, it is overwhelmingly likely that any hypothetical comparator would have been similarly treated.

60. For the above reasons, the claim for direct race discrimination fails.

Conclusion

61. The claim for unfair dismissal fails and is dismissed.

62. The claim for direct discrimination on the grounds of race fails and is dismissed.

Employment Judge Murdin

6th September 2023

Sent to the parties on:

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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