Case Number: 3335280/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Gerlin Arroyo Valencia	**v**	(1) Lindab Limited (2) Iain Robertson (3) Gail Horton (4) Rob Evans (5) Dave Cashen (6) Andrew Bradley (7) Steve Figg

Heard at: Cambridge (Face to Face) **On:** 6th to 10th February 2023 and 4th to 5th July 2023

Before: Employment Judge R Wood; Mrs E Davies; Mrs A Carvell

Appearances
For the Claimant: In Person
For the Respondent: Mr R Fitzpatrick (Counsel)

JUDGMENT

1. The claims of race discrimination against the second, third, fourth, sixth and seventh respondents are struck out under rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that they have no reasonable prospect of success.

2. The claimant was not the subject of discrimination based on race by the first or fifth respondent.

3. The claimant was not unfairly dismissed by the first respondent.

4. The claimant was not wrongfully dismissed by the first respondent.

DECISION

Claims and Issues

1. Page numbering referred to in square brackets in these reasons are to pages in the bundle, unless otherwise stated.

2. This is a claim which involves allegations of direct race discrimination, unfair dismissal, and wrongful dismissal.

3. The claimant argues that he was treated less favourably by the first and second respondent, and was dismissed from his employment, for reasons related to him being a black man. The first respondent ("the company") asserts that he was dismissed on the grounds of misconduct, or some other substantial reason. In particular, it is alleged by the first respondent that the claimant engaged in dishonest/fraudulent conduct in relation to the use of company fuel cards issued to him and/or in relation to the filling out of time sheets. In addition, it was said that there had been an irreparable breakdown in the relationships between the claimant and his colleagues which a amounted to a breach of the implied term of the contract as to trust and confidence.

4. In relation to the claim of discrimination, the respondents assert that there was no less favourable treatment and/or none which was on the grounds of the claimant being black.

5. In relation to the claim for unfair dismissal, the claimant submits that the dismissal was motivated by his race, and that there was no genuine belief that he had committed the misconduct alleged. Further, that there had been no breach of the implied term of the contract by reason of the surrounding circumstances. Furthermore, that the process engaged in by the first respondent was, in any event, unfair. The claimant also asserted that the sanction imposed was neither proportionate or reasonable set against the circumstances of the case. In any event, the claimant alleges that he could not lawfully be summarily dismissed, and was therefore at least entitled to notice pay upon dismissal.

Procedure, Documents and Evidence Heard

6. The Hearing took place on 6 to 10 February 2023, and on 4 and 5 July 2023. The claim was heard on a face to face basis at the Cambridge Employment Tribunal. We first of all heard testimony from the claimant, Mr Gerlin (as he preferred to be referred to at the hearing). From the respondents, we heard evidence from Mr Iain Robertson (managing director of the company), Gail Horton (Head of Human Resources ("HR")), Mr Rob Evans, Dave Cashen, Andrew Bradley, and Steve Figg. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. We also had an agreed bundle of documents which comprises 1100 pages; and copies of helpful and thorough written submissions from Mr Gerlin and Mr Fitzpatrick.

7. The history of these proceedings is protracted. Much of the history is of limited relevant for current purposes. However, it is noted that there was a preliminary hearing held on 24th February 2022. It was held in private by telephone. The claimant attended. The respondent was represented by Ms Danvers of counsel. The case management order appears in the bundle at

page123 onwards. The hearing was before Employment Judge Laidler sitting alone.

8. In the case management order, Judge Laidler set out a list of issues. She noted that the claimant agreed that the list represented the issues about which he complained. At the start of this hearing, we sought clarification of this point. Mr Fitzpatrick indicated that the respondent had prepared the case based on the list of issues. Mr Gerlin for his part denied that he had agreed that the list properly reflected the full extent of his case.

9. This Tribunal gave some consideration to amending the list of issues in the light of the evidence we had heard, to include further issues. Specifically, we considered adding issues relating to a claim of vicarious liability against the first respondent in respect of the alleged racially abusive incident between the claimant and Luke Bradley. However, we decided that it would not be just to do so, having regard to the overriding objectives, and to the case management history of this matter. There were a number of reasons for our decision. Firstly, we were not asked to amend the list by the claimant, or for that matter, any other aspect of his claim. Secondly, Judge Laidler herself noted that the claimant had been given a number of opportunities to clarify the nature of the claims. He had failed to do so in our view. The particularisation of the claims against each respondent was, in our judgment, poor. In a number of respects, the claims were vague. Thirdly, the case management order clearly set out the list of issues. We are satisfied that the claimant agreed these at the hearing, and had a copy of the document shortly afterwards. We have heard extensively from the claimant during the course of the case. On this issue, we have no hesitation in accepting the accuracy of the note of the very experienced Employment Judge.

10. On this issue, Mr Fitzpatrick referred us to the case of *Hassan v BBC [2023] EAT 48*. In this case, Mrs Justice Eadie warned against amending an apparently agreed list of issues at the final hearing, particularly if such changes might be inconsistent with the way the case had been understood at crucial earlier points in the case management of proceedings. Having reflected, we agree that to have done what we proposed to do, would have constituted a significant change to the complexion of the case, and one which would have been unfair to the respondents, especially the first respondent, and would have caused prejudice to its case, having prepared for a different one. We therefore proceed on the basis of the list of issues prepared by Judge Laidler.

11. We note that the list of issues makes no reference to other respondents save for the first and fifth. We were invited by Mr Fitzpatrick at the start of the hearing on 6th February 2023 to dismiss the cases against respondents 2-4 and 6-7. We delayed a consideration of this application until we had heard some evidence. Having now heard all of the evidence in this case, we conclude that the claims against respondents 2-4 and 6-7 are weak to the point of being non-existent, in the sense that there was insufficient evidence upon which to come close to finding a prima facie case of less

favourable conduct, or of such treatment based on race. We therefore accept the renewed invitation of Mr Fitzpatrick to dismiss these claims under rule 37. It is our view that this is what Judge Laidler had anticipated would happen when she set the list of issues.

12. This leaves the discrimination claims against the first (the company) and fifth (Mr Cashen) respondent as detailed in the list of issues, as well as the unfair dismissal and wrongful dismissal claims against the company.

Findings

13. Based on the evidence that we heard and read, the Employment Tribunal made the following primary findings of fact relevant to the issues that we had to determine.

14. The claimant's employment with the respondent began on 14 July 2014 as a driver. His responsibilities were to make deliveries to the company's branches within the UK using company HGV vehicles. He was initially licensed to drive up to HGV Class II vehicles. However, at some point in 2016, the claimant obtained his HGV Class I licence. The Tribunal accepts that during this process, the company and Mr Cashen provided encouragement and financial support for the claimant.

15. Driver's working hours were recorded for the purposes of payment of wages by paper time sheets. The Tribunal found this system to be old fashioned and inefficient. It was consistently difficult to work out what, at any particular time, the accepted procedure was for the filling out of time sheets. Doing the best we could on largely inconsistent and confusing evidence from all parties, we find that at the relevant time, namely in the summer of 2018 (prior to 19th September 2018), the process was that the employees were to input the times worked, and the line manager was to sign off on the information on a daily basis. At the end of the month, the completed time sheets would be handed to HR for payment of wages. On 19th September 2018, there was a change in the process to be adopted. This was introduced as a result of the claimant's grievance. The Tribunal will return to this below. However, it is clear that few of the witnesses we heard from had any confidence in the system for filling out of time sheets, including those in upper management within the company, not least because time sheets were stored in a way which made them accessible to anyone on the premises.They were far from secure.

16. Prior to the matters which are directly relevant to these claims, so far as the company's HR were concerned, the claimant had an unblemished disciplinary record. However, it became clear to the Tribunal that the situation was more complex than this. It found that there had been regular complaints about the claimant. Moreover, the claimant made regular complaints about a variety of issues relating to his working environment. The Tribunal found that the claimant was a divisive member of staff who, over a period of time, had developed poor relationships with some of his colleagues. Of note in this regard was the fact that during his grievance, the

claimant submitted a memory stick which had in the region of 8,000 photographs and in the region of 18 videos, all of his workplace and/or colleagues, in various contexts. This seemed to be part of an exercise in recording what he saw as breaches of company rules, in part to demonstrate an inequality of treatment. The Tribunal took the view that this provided a useful insight into the nature of the claimant's relationships at work.

17. On 23 August 2018, the claimant sent an email to Mr Cashen raising grievances about the recording of his working hours on the time sheets, and about the lack of a clocking-in machine. In essence, he was making criticism of those responsible for the recording of his time, and in particular, Mr Cashen. This was the 'first grievance' [134]. It was passed on to Mrs Horton, the HR manager.

18. On 28 August 2018, the claimant lodged his 'second grievance' with Mrs Horton by email [137]. This contained broader allegations against Mr Cashen. By way of summary, it was suggested that he had abused his power and had been critical of the claimant in a number of regards, such as alleged damage to vehicles, poor driving, taking breaks etc. Many of these appear in the list of issues, to which we will return. It was further suggested that Mr Cashen's behaviour was because the claimant was black.

19. The second email also alleged that there had been an unpleasant exchange between the claimant and another member of staff called Luke Bradley (a member of warehouse staff; and son of the 6th respondent) on or about Monday 6 August 2018. The claimant alleged that he had been racially abused in an aggressive manner. This event does not appear in the list of issues. We take the view that it is not a matter about which we are required to make findings.

20. Pursuant to the company's grievance policy [143], there was a meeting with the claimant on 4 September 2018, chaired by Mr Figg. There was also discussion with, amongst others, Dave Cashen. Other members of staff who it was thought might be able to assist in relation to the incident on 6 August were also interviewed, including Luke Bradley.

21. On 18 September 2018, the claimant was asked to hand over his keys and fob for the alarm to the building, which he did. He gave them to Mr Cashen.

22. On 19 September 2018, there was a meeting with the claimant during which he was informed of the outcome of the grievance. The written outcome appears at page 215 of the bundle. In short, the grievance had been dismissed on all grounds. No evidence could be found that the claimant's time sheets had been "sabotaged", as he had put it. It was concluded by Mr Figg that his timesheets had been amended only by the claimant himself.

23. Further, it was indicated that no evidence could be found that Mr Cashen had abused his power in that he had treated the claimant less favourably on the grounds of him being black. In fact, it was suggested that Mr Cashen had "championed" the claimant in the workplace in that he had pushed him

to achieve his HGV I licence, and supported a salary increase on two occasions. We accept this account of Mr Cashen's historical relationship with the claimant.

24. Moreover, Mr Figg found that there had been no racial language used on 6 August 2018, albeit that there had been an argument between the two. Further, Mr Figg found that it was an inclusive workplace with a 'family environment', and that there was no racism present. The claimant was notified that there would be new procedures adopted, including one relating to the filling out of time sheets. These applied to all staff, and not just the claimant. The claimant did not appeal this decision.

25. The Tribunal had concerns about the credibility of the claimant. We found his testimony to be strewn with inconsistencies. Moreover, it was very apparent that the claimant changed his case on certain points, seemingly almost on a whim. Some of this may have been to do with the fact that he was representing himself, and was unfamiliar with the procedure. However, it could not all be accounted for in this way. The Tribunal found him to be an unreliable source of information in a general sense. By way of example, in his written submissions on the final day of the hearing before us, the claimant alleged that he had received death threats arising out of these matters. Yet, there had been no significant attempt to progress this allegation at the hearing.

26. Furthermore, he argued that he was out of the country between the middle of December 2017 and the middle of January 2018. He adduced flight tickets in respect of this, but these related to inward flights to the UK in January 2017. This was relevant to the issue of whether he could have been responsible for certain of the fuel transactions. Despite requests, he has failed to provide further evidence on this issue.

27. The Tribunal finds that the relation ship between the claimant and Mr Cashen, as well as many other members of staff, was challenging. The claimant habitually complained about all manner of things. Further, it was clear to us that he did not deal with criticism well. Indeed, he tended to react defensively (e.g. the QEII bridge incident). He also made several complaints about time sheets, which included criticism of Andrew Bradley. The fact that the claimant was constantly taking photographs of his colleagues at work, allegedly when breaching health and safety rules, must have left a very bitter taste in the mouth's of others.

28. In terms of the other grounds for grievance, the Tribunal agreed with the findings of Mr Figg. It was difficult to see sufficient basis for the suggestion that Mr Cashen was abusing his power, or more importantly, that any abuse was because the claimant was black. The Tribunal accepted that Mr Cashen had supported the claimant's job application and his employment with the company. Further that he had also encouraged his attempts to obtain his HGV I licence. Mr Cashen had also supported the claimant's request for an increase in wages. The Tribunal finds that Mr Cashen was not historically racist, or otherwise antagonistic towards the claimant. It was our impression

that Mr Cashen's patience with the claimant expired after the incident involving Luke Bradley, and its aftermath.

29. The Tribunal finds that there appeared to have been a change in the claimant's attitude in 2017, when he had been restricted to HGV class II vehicles after criticism of his driving. This was when the claimant's general outlook on his employment with the company altered, and when he began to make complaints about his working conditions, and his treatment by Mr Cashen. This was also when there was an increase in complaints made by staff and members of the public about the claimant. It has been difficult to be precise about these matters, because Mr Cashen seems never to have recorded anything in writing. The Tribunal concludes that this was not the result of sinister intentions, but of rather old fashioned and complacent management techniques on his part.

30. In relation to the matters set out in the case management order as grounds of discrimination against Mr Cashen, the Tribunal is satisfied that none are made out. So far as we can tell, in the light of a complete absence of written records, there is insufficient evidence that the claimant was treated less favourably than others, or that any such treatment was based on his race. We accept Mr Cashen's testimony on this point. The claimant seemed to accept during the hearing that at least some of the issues raised were born out genuine incidents. For instance, Mr Gerlin accepted that there had been a complaint from a member of the public as to his driving over the QEII bridge. The claimant did not accept the criticism made of him, but the Tribunal found that it was a complaint upon which Mr Cashen was bound to act. In effect, it was an allegation of poor driving.

31. There was limited evidence that the claimant was disciplined formally by Mr Cashen in respect of any of the matters set out in the CMO. It seems that he preferred to deal with things informally and off the record. This leaves much to be desired in some ways. However, the evidence we read and heard suggested that he treated everyone in the same way. Even the restriction of the claimant's driving to HGV II vehicles was done outside of the formal disciplinary process, and without any other detriment such as a reduction in pay or hours. That being said, it was clearly a matter of significance for the claimant. In short, we find that there was insufficient evidence of racial motivation on the part of Mr Cashen. If there had been any ill intention on Mr Cashen's part, then there would have been several opportunities for him to have escalated these issues. In addition, we also heard that there had been concerns about the claimant filling in tachographs incorrectly or not at all. The fact that Mr Cashen preferred to deal with matters quietly, and outside the disciplinary procedure, did not support the claimant's allegation of racial motivation.

32. We found that the way the claimant argued his case against Mr Cashen, and the other individual respondents, on discrimination to be poorly particularised and confused. The claimant repeatedly failed to put his case in a coherent and consistent fashion, and had to be prompted by the

Tribunal.

33. In terms of a comparator, although there were some named in the CMO, we find that there was very limited evidence of relevant comparators in this case. Instead, the claimant sought to rely upon very broad assertions of discriminatory motivation. He failed to sufficiently highlight any other members of staff who were, in a demonstrable sense, being treated differently to himself.

34. Mr Figg was a respondent. The pleaded case against him was very vague. At the hearing, and not without some cajoling on the Tribunal's part, the claimant put to him that he had ignored the weight of evidence in support of his grievance and had found against him because he was black. The Tribunal finds insufficient evidence in support of this allegation. It was our impression of Mr Figg that he was genuine and credible. He denied any racial motivation. He was not based in Northampton and was therefore, at least to some extent, independent of the dynamics of that work place. Ultimately, it is the Tribunal's view that he made a genuine decision on the grievance.

35. On 19 September 2018, during the grievance outcome meeting, the claimant raised a further issue relating to time sheets. He alleged that his time sheet for 14 September had been changed after he had signed it. This prompted Mrs Horton to commence a further investigation into this allegation. On the same day, Mr Andrew Bradley made an allegation against the claimant that he had stolen a parcel of his which had been left on reception. This too was investigated, initially by Mrs Horton.

36. In relation to Friday 14 September, the claimant told Mr Figg and Mrs Horton that he had finished work at 4pm, having returned to the branch at 3.30pm. He said his time sheet had been completed accordingly, on the day, by Mr Cashen. But when he had come back to work on the following Monday, his time sheet had been altered from 4pm to 2pm. He suggested he had left work with Mr Cashen. Mr Figg and Mrs Horton interviewed Mr Cashen again. He stated that he had initially filled out the claimant's time sheets at about 2pm with the time "14.00", and that he had later changed the time from '14.00 hours' to 2pm. He said he has left the branch at 2pm because he was meeting his wife at 2.30 in Market Harborough. He stated that he could not have signed the claimant out at 4pm because he was not at work at that time.

37. The claimant's tachograph was downloaded for that day. It showed that he had arrived back at branch at 1.47pm. The claimant then suggested that he had worked in the warehouse between 2pm and 4pm. It also transpired that Mr Cashen's computer had been signed out at just after 2pm. The evidence of the tachograph data, and of the logging out times for Mr Cashen's computer, were not in dispute at the hearing. The Tribunal is satisfied that this evidence clearly demonstrated that the claimant had lied about his movements that afternoon, and in particular, when he had left work.

38. In relation to the stolen parcel, the evidence was simple. Mr Bradley explained to Mrs Horton that when he noticed that the parcel had gone missing, he saw the claimant grinning. Mr Bradley called him a 'fucking thief'. Mr Bradley suggested that it was not the first time he had done this sort of thing. This comment related to a parcel of Stuart Ridger's. There was no other evidence linking the claimant with the parcel.

39. On 19 September 2018, Mrs Horton had a meeting with both the claimant and Mr Cashen. She suggested that it was arranged with a view to restoring some trust and honesty between the two men. The meeting did not go well. Indeed, Mr Cashen asked the claimant to withdraw his complaint against himself and Mr Luke Bradley. The claimant confirmed that he would not do so.

40. At about 4pm on 19th September 2019, Mrs Horton took the decision to suspend the claimant. She stated that this was to put some distance between the claimant and his colleagues, and so that the allegations against him could be investigated i.e. the time sheet and parcel allegations. It was our view of Mrs Horton that she was a genuine and credible witness. We could see insufficient evidence that Mrs Horton was motivated by race. Indeed, the claimant found it difficult to be specific as to what she had done in this regard, beyond the suspension.

41. Over the next few days, Mrs Horton had investigatory interviews with several members of staff. These included Mr Cashen, Andrew Bradley, Luke Bradley, Arnie Matthews, Martyn Brooks, Lauren Evans, Stuart Ridgers, and Barry Ridgers. Copies of the notes of the interviews can be found at pages 200 to 231 of the bundle.

42. In terms, the staff explained that they would find it difficult or impossible to work with the claimant after recent events. Further, no-one had seen the claimant working on Friday 14 September 2018 between 2pm and 4pm, nor had they seen him leave the premises at 4pm. Stuart Ridgers explained that the claimant had taken a parcel of his from reception and had returned it the following day, even though he had not been requested to do so.

43. We take the view that suspension in this case was not appropriate. It is our view that the suggestion of the break down in relationships was over-inflated by the first respondent, and Mrs Horton. In our judgment, it was an error, and unreasonable, to have so quickly and directly canvassed multiple members of staff, in effect inviting them to say that they could no longer work with the claimant. The exercise made matters worse, and was, in our view, indicative of an enthusiasm on the part of the company to dismiss the claimant.

44. In the days that followed, the company employed a temporary driver to replace the claimant. He needed to have access to the fuel cards to the vehicle usually allocated to the claimant. This caused a search for the three cards which were used in respect of each vehicle. Two of them were readily identified, in Mr Cashen's drawer. We were told that the other, a Fast Fuel

card, could not be found according to Mrs Horton. There was a check carried out of the most recent transactions, which we were told was done to ascertain where and by whom it was last used. A list of transactions was produced from 1/1/17 to 24/9/19. This was created on 24 September 2018, and appears at page 222 of the bundle. The schedule of transactions showed that the fuel card had been used quite recently, and in respect of the vehicle FN64 DFO, which was a vehicle used regularly (though not exclusively) by the claimant.

45. There were some matters of concern arising out of this schedule. Firstly, there appeared to be transactions at times of the day and week when the claimant would not have been at work. Secondly, there were transactions for very small amounts, having regard to the size of the commercial vehicles being used by the claimant. Thirdly, and perhaps most importantly, there were two transactions which appeared to involve a vehicle registration YN14 UMX, which was not a company vehicle. It was believed that this was a private vehicle owned/used by the claimant.

46. As a result of these matters, on 26th September 2018, the claimant was sent a letter inviting him to a disciplinary hearing to be held on 3rd October 2018 [219].

47. On 2 October 2018, the company's premises were entered after work hours. The entry log showed that the building was accessed at 22.11hrs and closed at 22.39hrs. The building was accessed using fob number 5. This fob was not assigned to anyone.

48. The disciplinary process was dealt with by Iain Robertson (company managing director and second respondent) and Chanel Queensborough-Blackburn (HR advisor). The claimant attended on 3rd October 2018. The notes of this meeting appear at page 249 of the bundle. During the meeting, the claimant stated that the Fast Fuel card was not in his possession, but was with Mr Cashen. We are satisfied that this hearing was conducted in such a way as to make it clear what the allegations were against the claimant, and so as to give the claimant every opportunity to respond.

49. Afterwards, further investigation interviews were carried out with Mr Cashen, Miss Sarah Downes (purchase and stock control coordinator) and Stuart Ridgers. The notes of these interviews are at pages 263-272 of the bundle. In the case of Mr Cashen, it transpired that the missing fuel card was in his desk, as suggested by the claimant. Fob 5 was never found and was subsequently cancelled.

50. Upon examination of the witnesses, there was some confusion as to the nature of the fuel purchase allegations. Mrs Horton had thought that they extended to every highlighted transaction on the schedule. However, Mr Robertson believed that the allegations related only to the two transactions relating to the claimant's personal vehicle registration YN14 UMX, which occurred in November and December 2017 [223]. The wording of the invitation to the meeting suggested that the allegation went beyond the use

of his personal vehicle. The claimant appeared to be ask questions based on highlighted transactions and not just the those relating to his personal vehicle. It was confusing.

51. The claimant for his part confirmed at the meeting that he was assigned to vehicle FN64 DFO, but was not the only person. He said he tended to top up the vehicle most days. He could not explain why the fuel card was being used outside of normal working hours. He explained that the fuel cards were generally kept in the lorry, along with the PIN needed to purchase fuel.

52. The claimant went on to explain that the card he had used had expired in July 2018. The Tribunal does not accept this evidence. It accepts the evidence adduced by Mrs Horton that the card was not due to expire until 2021. The claimant said the last time he used it would have been in May, June or July 2018. He said he believed Mr Cashen had the Fast Fuel card.

53. Importantly, we find that in the meeting the claimant admitted that the vehicle registration YN14 UMX was his vehicle. He also accepted that the reference to YN14 UXX in the record of the second of the two transactions was clearly a case of someone who had intended to input registration YN14 UMX. In other words, that it was simply a typographical error. We accept this evidence. This is an important point in the context of the case as a whole. All parties accepted that it was improper to purchase fuel on one of the cards for private use. It would therefore be dishonest for the claimant to fill up a privately owned vehicle.

54. The Tribunal asked the claimant questions on this issue on a number of separate occasions. It was very difficult to get a straight answer. We found the claimant to be evasive and inconsistent on this issue. In broad terms, during the hearing he denied owning vehicle registration YN14 UMX, although he could provide no explanation for someone using the card for such a vehicle. He denied telling Mr Robertson that he owned the vehicle. In particular, when the notes of the meeting were pointed out to him, he stated that the notes were incorrect.

55. On this question, we were directed to an email from the claimant in which the claimant confirms that the notes of the meeting are accurate. This is to be compared to an earlier email, in which he makes sweeping criticisms of the accuracy of earlier meetings during the grievance process. When pushed on his ownership of the vehicle, the claimant told us that he had later purchased a Toyota with a very similar registration plate. He also told us that he had a number of vehicles at the time, but only adduced evidence of one, namely a BMW 3 Series. Later he told us that registration YN14 UMX was a Ford vehicle. In short, it was all very confusing and lacking in credibility. Consequently, we did not accept the claimant's evidence on this point. We are satisfied that he admitted owning the vehicle at the disciplinary hearing because in fact he did own it, at least in November/December 2017.

56. Further at the disciplinary hearing, there was a discussion about the events of 14 September 2018. The claimant was told that Mr Cashen had

contradicted him about the time he had left work i.e. that the claimant had finished work at 3.30pm and left at about 4pm. He was adamant that Mr Cashen had changed his time sheet from 4pm to 2pm, and that Mr Cashen had been the last person he had seen when he left at 4pm.

57. In addition to 14 September time sheet, it was part of the matters being investigated that other time sheets had been filled out in a way that was dishonest. The Tribunal invested quite a lot of time during the hearing trying to find out which of the other time sheets it was alleged had been improperly completed, and how it was that the company could ascertain that the claimant had fraudulently filled them out. The answer to the last question appeared to be by reference to handwriting on the sheets which was said to be verifiably the claimant's. However, notwithstanding a number of questions to Mr Robertson, he was unable to explain his rationale to our satisfaction. It seemed most likely that Mr Robertson had been concerned about times filled out for 23 July 2018, but again he was very hazy about this.

58. There were a number of copies of time sheets in the bundle. Some appeared to be copies supplied by the respondent [226-228]. Some were photographs of the time sheets taken by the claimant at various times [225]. It was very difficult to work out what the provenance of each of the copies was, and how they fitted into the overall time line of the case. At paragraph 19 of his witness statement, Mr Robertson states "I checked the time sheets and noticed that amendments appeared to be the same as the time recorded on 23 July 2018. However, it was not at all clear which entries he was comparing. Further, the entry on 23 July 2018 has clearly been altered several times [226], so it is difficult to see how it can be a useful sample of the claimant's handwriting, if that was the exercise Mr Robertson undertook. In the Tribunal's judgment, it was all rather confused and unsatisfactory.

59. The claimant was also asked about the relationships with his colleagues. He expressed the belief that he would be able to work with them, notwithstanding their views. He was asked about the late entry to the premises on the previous day. He stated that he had occasionally worked late if he needed to load the lorry. He would set the alarm and use the fob if he was required to do this.

60. The claimant was dismissed by letter dated 8 October 2018. It was decided that the claimant had committed acts of gross misconduct. These were the use of the Fast Fuel card in relation to his personal vehicle; amending his own time sheets for July; and not telling the truth about when he left the site in 14 September 2018 i.e. at 2pm not 4pm. The allegation in relation to the theft of the parcel was not upheld. However, Mr Robertson accepted that there had been a breach of the implied term of the contract as alleged.

61. We have some concerns about the nature of the investigation conducted leading to this letter, and as to the conclusions drawn by Mr Robertson. In fairness, he had interviewed a large number of people. It was clear to us that he had made a concerted effort to ascertain the truth of the matters

before him. We saw insufficient evidence that Mr Robertson's motivation was based on the claimant's race. He appeared to us to be a fair and credible witness, who was perhaps a little out of his depth at times when dealing with this matter.

62. That being said, there were concerns. Firstly, in relation to the matters arising out of events on 14 September, Mr Robertson accepted that he had not himself examined the time sheet for that day. We appreciate Mr Fitzpatrick's argument that this allegation is not reliant on that time sheet, in the sense that the claimant was alleged to have lied to Mr Figg about when he left work that day. We accept that this is, in itself, a potentially serious matter, and that it was proper that this be investigated.

63. However, the time sheet itself remained, in our view, an important part of the evidence. It was necessary for Mr Robertson to make findings as to the relative credibility of Mr Cashen and the claimant as to the question of the filling out of the time sheet, and when both left the site. Mr Cashen's evidence was that he had filled out the time sheet at about 2pm, initially with the entry "14.00", only to change it a few minutes later (in the absence of the claimant) to "2". If one examines what we have found to be the appropriate time sheet, i.e. at page 225 of the bundle, it is clear to us that there is inadequate space to comfortably enter 4 numerals in the box provided. This is apparent from other entries when staff have arrived or left otherwise than on the hour. Further, there are no other examples of anyone using the 24 hour clock for 'pm' times on any of the time sheets we have seen. In the Tribunal's judgment, it is unlikely that Mr Cashen would have done so, especially given the sensibilities of the claimant re. time sheets. Even if one looks at the amended time sheet with the tippex amendment, it is clear that the corrected area is too small to conceal "14.00".

64. In our view, had Mr Robertson looked at the time sheet, he would more likely than not have concluded, as we have, that Mr Cashen was not telling the truth about his completion of the time sheet for 14 September. It is our conclusion that Mr Cashen initially put "4" in the box. He did this at about 2pm, in the expectation that the claimant would work until 4pm. However, when he found out on the following Monday that he had not remained at work for that long, he changed it to "2", without reference to the claimant.

65. We find that the procedure for filling out the time sheets was confused. We were repeatedly told that it was subject to regular changes, not least because of the complaints made by the claimant. Prior to 19 September 2018, there was no written procedure. This resulted in an inconsistent understanding of how the time sheets should be completed. The best we could do was that on 14 September 2018, the procedure generally applied was that the member of staff would fill out the times, and then the line manager would sign it off. In the claimant's case, that would have been Andrew Bradley, not Mr Cashen. The changing of the time sheet for 14 September was outside this procedure, as was putting 4pm when it was only 2pm. That being said, we are also satisfied that the claimant did not work until 4pm, and that he lied in telling Mr Figg that he had done so. The

claimant's evidence about this was confusing and inconsistent. We are satisfied that this was a finding which was open to a reasonable employer in the context of this case.

66. This brings us to the third bullet point of the dismissal letter, namely the general allegation of dishonestly amending time sheets. Mr Robertson states "you have stated that Dave Cashen amended the time sheet however we have a genuine belief that it was you that amended the time sheet and not Dave Cashen.". The difficulty here is that it is impossible to to work out with any certainty which time sheet(s) are being referred to and/or what evidence suggests that it was the claimant who filled them out. Further, it is unclear which part of the time sheet it is suggested he completed. Of course, under the procedure applying at the time, he was expected to fill out the times, leaving the line manager to sign it. The letter does not deal with these important issues in a satisfactory way. It was our view that there was insufficient evidence upon which Mr Robertson could have found this allegation proved in the sense that it was not a conclusion that a reasonable employer could have arrived at. It was not one that Mr Robertson could come close to explaining to us at the hearing. We note that this aspect of the claimant's case at appeal was upheld by Mr Evans, who told us that he had little faith in the system for filling out time sheets at the time. This seemed to us to be the correct decision on the evidence.

67. As to the first bullet point re. The fuel cards, there are further confusions. Firstly, it is clear that although Mr Robertson told us that he had dismissed the claimant only on the basis of the two "YN14 UMX" transactions, this was not supported by the dismissal letter. It is clear that the first bullet point of reasons is divided into two parts. The first, on page 1 of the letter, relates to the general transactions i.e. not "YN14 UMX". The first two lines of the second page relate to the claimant's personal vehicle.

68. The evidence relied upon is also rather difficult to reconcile. It is suggested that it can be identified that the claimant was using the card until recently by reason of the fact that the card was used on 16 August for a vehicle allocated to him on 13 August i.e. BN16 PRX. However, it was not clear how this assisted in identifying that the claimant was involved in other transactions, particularly those said to involve the claimant's personal vehicle in November 2017. The evidence that we heard was that the cards were allocated to the vehicles, and that they were not kept in the possession of drivers. There seemed to be no dispute that the claimant was not the only person who used the relevant vehicles (BN16 PRX and FN64 DFO), and therefore not the only person who used the cards allocated to those vehicles. There was no explanation of how Mr Robertson overcame this issue.

69. Again we note that this part of the allegation was upheld on appeal such that the only two transactions relied upon by Mr Evans were those relating to the clamant's private vehicle. Mr Evans told us that because the clamant did not use the company vehicles exclusively, the evidence was not strong enough to place reliance on other transactions on the schedule. Again, we

agree with Mr Evans. It seems to us again that what defects occurred at the disciplinary stage, were rectified at appeal.

70. We note that Mr Robertson found insufficient evidence of theft of a parcel. We were surprised that this was thought sufficient to be part of the disciplinary hearing. Even Mr Bradley conceded that he had no evidence that the claimant was responsible.

71. It was the Tribunal's conclusion that much of what is set out above was tainted by the issue of the claimant's perceived lack of popularity. Mr Robertson concluded in the dismissal letter that " We also believe that the working relationship between you and members of the Northampton distribution team had broken down to such an extent that it is irreparable. This is based on the statements provided by your colleagues which state that they were unable to work you and feel that the trust has gone.".

72. The construction of the letter suggests that this was not a ground of gross misconduct. Mr Robertson said he would not have dismissed on this ground alone. However, it was is view that this lack of "trust" informed the decision to dismiss more broadly. The company was keen to dismiss what it perceived to be a problem employee. It actively looked for reasons to dismiss. But we are satisfied that this was not racially motivated. The Tribunal was satisfied that it was this sentiment that mainly prompted an examination of the fuel transactions. It is why the claimant was suspended so quickly. This is to be compared to Luke Bradley who had not been suspended, even in relation to an allegation of racial abuse.

73. The claimant appealed the decision to dismiss. This was dealt with by Rob Evans, as we have already identified. The appeal was heard on 8 November 2018. It is our view that Mr Evans was an honest and straightforward witness. Save, as with the others, that he was said to be part of some broader conspiracy against the claimant, it was difficult to understand what the allegations of discrimination were against Mr Evans. We saw insufficient evidence that he was motivated by the claimant's race. He had been selected to deal with the appeal by default, he being the next most senior to Mr Robertson.

74. As already stated, Mr Evans dismissed the appeal on two grounds, namely the purchase of fuel in relation to YN14 UMX, and the 14 September time sheet. He upheld the appeal on the remainder of the fuel transactions, and in relation to the other time sheet related allegations. In our view, these were reasonable, maybe even generous, concessions in favour of the claimant. To suggest that Mr Evans was in any way antagonistic towards the claimant, whether because of his race or some other reason, is, in our view, unfounded.

75. Again, there were some concerns about the approach adopted by Mr Evans. He admitted to us that he had not read the claimant's grounds of appeal. He later said he had skim read them in order to see if there was anything relevant in them. On either approach, it leaves much to be desired. It is

hoped that it goes without saying that someone who is dealing with such an appeal must thoroughly read the grounds of appeal, if submitted. That being said, Mr Evans explained that he was able to glean from the claimant during the hearing what his appeal was about. We take the view that, by reason of the nature of the decision, he appeared to have grasped the points being made. Mr Evans told us that he felt the case on the purchase of fuel for the claimant's own vehicle, and the 14th September time sheet, were strong. As we have already stated, we agree.

Decision

76. In summary then, and dealing first with the direct race discrimination claim, we strike out the claims in relation to respondents 2-4, and 6-7. In relation to Mr Cashen and the company, we find, in keeping with the matters set out above, that there was insufficient evidence that any of the matters contained in the list of issues constituted either less favourable treatment by Mr Cashen and/or treatment based on the claimant's race. The matters complained of were often relatively minor, day to day, issues, dealt with informally. There was little or no evidence that others were treated differently. In is our view that over time the claimant had developed a rather jaundiced view of his colleagues. The evidence of thousands of photographs that the claimant took is perhaps an insight into his state of mind. This led him to take criticism badly, which further soured his work relationships, especially with Mr Cashen. The problems were not the result of racist attitudes by management in our judgment. We therefore dismiss the remaining discrimination claims against the company and Mr Cashen.

77. Neither do we find that there was an unfair dismissal here. At the heart of our findings is the conclusion that the case against the claimant with regard to the two fuel transactions, and the 14 September timesheet, were evidentially robust. The investigation was thorough. The company complied with it disciplinary policy. The claimant had a full and repeated opportunity to put his case. In broad terms, it was our view that he failed to address the key points in a coherent and consistent way. This pattern has continued throughout these proceedings. The finding of gross misconduct on the basis of theft and fraud were well within a band of reasonable decisions. So was the decision to dismiss. Although we did have some reservations about isolated issues relating to the approach adopted by the company and its managers, looking at the matter in the round, we are satisfied that these issues did not render the dismissal unfair. Dealing with the claimant's grievances and his disciplinary process was no doubt challenging for those concerned. Some of the issues we have identified we no doubt partly as a result of these challenges.

78. The claimant was summarily dismissed for gross misconduct. This was justified on the evidence. He was therefore not entitled to notice pay, and was not wrongfully dismissed. We dismiss this claim as well.

Employment Judge R Wood

Date: 18th September 2023…….

Sent to the parties on:
26 September 2023

For the Tribunal Office