Case Number: 3305946/2022
3305947/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Joao	**v**	(1)Yodel Deliveries Network Ltd (2) TC Facilities Management Ltd

Heard at: Watford Employment Tribunal (hybrid)
Between: 29 April 2024 to 3 May 2024 (5 days)

Before: Employment Judge French
Members: Ms S Boot
Mr R Baber

Appearances
For the Claimant: In person
For the Respondent: (1) Ms Kaye (Counsel)
(2) Mr Underwood (Counsel)

JUDGMENT

1. Following a concession by the second respondent that a fair procedure was not followed, the complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed by the second respondent.

2. There is a 25 % chance that the claimant would have been fairly dismissed in any event.

3. The Tribunal does not consider that it is just and equitable to reduce the basic award because of the claimant's conduct before the dismissal. The Tribunal do not consider it is just and equitable to reduce the compensatory award due to any contribution to the dismissal by blameworthy conduct.

4. The second respondent shall pay the claimant the following sums:

   A basic award of £3805.12.
   A compensatory award of ££2762.96

   Note that these are actual the sums payable to the claimant after any deductions or uplifts have been applied, the total sum payable being

£6568.08. The claimant did not claim benefits following his dismissal and the recoupment provisions therefore do not apply.

5. The complaint of direct race discrimination against the first and second respondents was not presented within the applicable time limit. It is not just and equitable to extend the time limit. The claim is therefore dismissed. In any event the complaint is not well founded for the reasons given below.

6. Reasons having been given orally at the hearing, the claimant requested written reasons pursuant to Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013 and these are provided below.

REASONS

Introduction

1. This is a claim that has been brought by the claimant by way of ET1 dated 25 May 2022. He brings claims for unfair dismissal and direct race discrimination. The unfair dismissal concerns the second respondent TC Facilities Management Ltd who was the claimant's employer. The first respondent is a client of the second respondents who provided cleaning services to them at their Borehamwood site.

2. The race discrimination complaint concerns both respondents. During the course of the proceedings there was a concession in relation to the unfair dismissal; that is the second respondent accepts that there was not a fair procedure followed and as such Judgment was issued on that claim in the claimant's favour.

3. The Tribunal's findings, therefore, relates to the race discrimination claim and remedy only for unfair dismissal.

Evidence

4. We have a bundle consisting of 414 pages and witness statements from six witnesses. The Tribunal heard from the claimant himself. The first respondent called Shamiza Akbar who was a customer service support officer for which part of her duties included carrying out monthly audits of the cleaning provided by the second respondent. The first respondent also called Pam Suprai-Phull employed as a Human Resources Business Partner.

5. For the second respondent we heard from three witnesses. The Tribunal did not hear from the fourth witness Ms Elizbieta Piechota (who dealt with the appeal against dismissal) due to the concession made by the respondent. Ms Loredana Mandache was employed as an area manager and acted as the claimant's line manager. Mr Gavin Alecock was also an area manager. He dealt with the claimant's grievance and was the dismissing officer. Ms Isabella Aksamit was an area manager and dealt with the claimant's grievance appeal.

The issues

6. The issues are outlined in the case management order of Employment Judge Bedeau dated 31 March 2023 and repeated as follows using the same numbering:

Unfair dismissal, section 98(4) Employment Rights Act 1996

1.1 What was the reason or principal reason for dismissing the claimant? It is TC Facilities case that he failed to carry out his cleaning duties and was under a live final written warning. The claimant's case is that it was unfair to require him to carry out the same amount of work on reduced hours.

1.2 Had TC Facilities followed a fair procedure in dismissing the claimant?

1.3 Was dismissal within the range of reasonable responses? Race discrimination claims 4.

Direct Race Discrimination, Equality Act 2010 section 13 Yodel and TC Facilities

4.1 Was the claimant, a black African, treated less favourably because of his race or race, in that: -

5.1.1 LM and SK colluded to fail his audits during the period from February 2021 to March 2022;

5.1.2 Who is the comparator?

The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between the circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says he was treated less favourably than RK, who is Asian, and a Cleaner engaged in cleaning the warehouse but who is not black and whose cleaning audits were passed.

4.2 The claimant contends that SK is also Asian and from the same geographical region in Asia as RK. LM is a white Eastern European.

4.3 If so, are there primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4.4 If so, can the respondent prove a non-discriminatory reason for the treatment complained of?

Jurisdiction (Equality Act 2010 claims)

8.1 Did any of the respondents acts/omissions which the claimant alleges were unlawful direct discrimination under s.13 Equality Act 2010 presented out of time?

8.2 Did those acts/omissions form part of a continuing act?

8.3 If not part of a continuing act, were the claimant's ss.13 Equality Act 2010 complaints about those acts/omissions presented within 3 months of those acts/omissions?

8.4 If not, is it just and equitable for the Tribunal to extend time to allow those complaints to be presented out of time and determined on their merits?

10. Remedy for Unfair Dismissal

10.1 If there is a compensatory award, how much should it be? The Tribunal will take into account factors including the claimant's financial losses and mitigation.

11. Remedy for Equality Act Claims

11.1 What financial losses has the discrimination caused the claimant?

11.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

11.3 If not, for what period of loss should the claimant be compensated?

11.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

11.5 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

11.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

11.7 Did the respondent or the claimant unreasonably fail to comply with the ACAS Code?

11.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

7. The first issue for the Tribunal to determine in this claim is whether or not we have jurisdiction to deal with the matter, it appearing that it may have been presented outside of the three-month time period.

<u>The law – time limits</u>

8. The relevant time-limit is at section 123 Equality Act 2010. Section 123 provides:

'(1) Subject to section 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.
(2) ….
(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.
(4) ……'

9. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

10. Unlawful discrimination claims may be considered out of time provided that the claim is presented within 'such other period as the employment tribunal thinks just and equitable' — s123(1)(b) Equality Act 2010. The test is less strict than in unfair dismissal cases and the tribunal has a wide discretion.

11. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion has been said to be the exception, not the rule (Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576). LJ Auld stated at paragraph 25 *'It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*'

12. The Tribunal also notes N Jones v The Secretary of State for Health and Social Care 2024 EAT 2 paragraph 31 which states '*The propositions of law for which Robertson is authority are that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere. The comments of Auld LJ relate to the employment law context in which time limits are relatively short and makes the uncontroversial point that time limits should be complied with. But that is in the context of the wide discretion permitting an extension of time on just and equitable grounds.'*

13. As confirmed by the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, Underhill at paragraphs 37 and 38 stated that the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay. If it checks those factors against the list in Keeble, well and good; but he would not recommend taking it as the framework for its thinking.

14. The British Coal Corporation v Keeble [1997] IRLR 36 set out below, as well as other potentially relevant factors:
    The extent to which the cogency of the evidence is likely to be affected by the delay.
    The extent to which the party sued had co-operated with any requests for information.
    The promptness with which the claimant acted once they knew of the possibility of taking action.
    The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

15. The fact that the claimant was awaiting the outcome of a grievance or appeal is also a relevant, but not a decisive, factor.

16. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, Leggatt LJ, having referred to section 123, stated, at paragraphs. 18-19 of his judgment:
    "18. … [I]t is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see [Keeble]), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [Afolabi]. …

17. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for

example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

18. In the case of Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 at Sedley LJ [31] and [32] that there is "no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised" and that whether to grant an extension "is not a question of either policy or law" but "of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it". For this reason, the exercise of the discretion is rarely subject to successful appeal.

Fact finding and conclusions – time limit issue

19. In this case the claim was presented on 25 May 2022. It is a matter of fact that the last failed or 'red' audit, and I stress, failed on the grounds of it being a 'red' audit, was 29 December 2021. The respondent's case is that that is therefore the last act of discrimination, and that ACAS should have therefore been contacted by 28 March 2022 (3 months less 1 day). The claimant, in their submission was therefore already out of time when he made contact with ACAS on 24 May 2022 and was also out of time when he presented his claim on 25 May 2022 and it is the respondent's case, therefore, that the claimant was at least two months out of time.

20. The Tribunal have looked at the evidence in this regard and we do find that the January 2022 audit was also considered a fail by the respondents. We accept that it is marked as 'amber' rather than 'red' but when looking at page 366, the invitation to the disciplinary meeting, there is reference to there being another 'failure' in January 2022. The Tribunal notes that an amber is not itself a fail but on the understanding of the evidence heard from the respondent's witnesses, it still needs improvement.

21. We find the respondent did consider it a fail because of the invitation letter but also, the evidence of Mr Alecock at paragraph 51 of his witness statement where he says there was a further audit failure in January 2022. Therefore, we find that the last act in the series was a failed audit on 31 January 2022.

22. Three calendar months less a day from 31 January 2022 would take us to 29 April 2022 so the claimant is still, out of time when he contacted ACAS on 24 May 2022 and presented the claim on 25 May 2022 and, as such, the Tribunal does go on to consider whether it would be just and equitable to extend time.

23. In this regard the claimant has not included why it would be just and equitable to extend time in his witness statement. He does not explain the reason for the delay. He does offer an explanation in his submissions, but the Tribunal do accept the representations of Miss Kaye in that regard namely that submissions are not evidence and that is simply a matter of rules of evidence.

24. That being said, we do note that the claimant is a litigant in person and has done his best to present his claim. That doesn't, however, mean that he is exempt from the rules. The Tribunal note the civil case of ***Barton v Wright Hassall LLP*** [2018] UKSC 12 which is authority for this.

25. What the Tribunal do note is that witness statement evidence was directed within the Case Management Order of Employment Judge Bedeau from 23 March 2023 and directions were made for a statement from the claimant to include all of the issues in the claim. The issue of time limits was listed as an issue in the claim and, as such, the claimant could have and should have addressed that issue within his witness statement.

26. The Tribunal make clear that in making its findings we have disregarded the submissions by the claimant for those reasons. The claimant bears the burden of advancing the reason for the delay and he has to do that within the rules of evidence and, as I have said, submissions are not evidence.

27. What the Tribunal can do, however, is look at the actual evidence that it had before it and what we can see is that there was an internal grievance procedure. Now that is not a decisive factor, but it is relevant, and the Tribunal are of the view that there would be equal criticism of a claimant who does not participate in an internal process.

28. The Tribunal also note that on 23 January 2022, being the date, the claimant brought his grievance at page 314, he had formed a view that Shamiza had committed an act of race discrimination. That is borne out in his answer under cross examination and consistent with the words 'less favourable' and 'treatment' in that document.

29. The panel makes the following observations in relation to the grievance process. In terms of the first respondent, there was a grievance meeting on 28 February, the outcome of that is at page 340. That document is undated but the claimant's evidence is that he received that on 20 March and that would be consistent with the fact that he appeals it on 23 March, so it is assumed that he certainly had it at some point between the meeting and his appeal on 23 March. Then at page 371 on 5 April he is told that Yodel will not be taking the appeal any further forward. So, in terms of Yodel, the grievance process is concluded by that date.

30. In relation to the second respondent, the grievance outcome is at page 325, that is following a meeting on 28 January and that outcome is dated 7 February. Again, the claimant appeals that. He appeals it on the 11 February and the outcome of that is given to him on 10 March and can be seen at page 350.

31. The Tribunal conclude from that, that even if the Claimant were awaiting the grievance process to conclude before issuing his claim, that concludes, on the latest date by 5 April 2022. On our findings he should have presented his claim by 29 April 2022 (being 3 months from the last series of acts), and so the grievance process had long concluded prior to the expiry time.

32. What we then have is a delay between 29 April 2022 and him contacting ACAS on 24 May and that is in context of the fact that as early as January 2022 in his initial grievance, the claimant was identifying discrimination and, on the evidence, no reason for the delay has been advanced.

33. The Tribunal also note from the evidence that the claimant is engaging with the process throughout this period. He is aware of the ability to bring a grievance and appeal. Although it is noted that the respondent advised the claimant of his right to appeal which goes to his understanding, he refers in his early grievance to the wording of the Equality Act 2010 and, the conclusion of the Tribunal is that it is clear that the claimant has done some research in relation to a potential claim.

34. The Tribunal can also see from the evidence at page 354 that the Claimant was provided with the audit scores on 22 March 2022. His allegation of discrimination is collusion in relation with those audits and he is in possession of them on that date.

35. The Tribunal do consider the prejudice on the respondents. We consider that that is limited because ultimately, they have been able to present their case and that is self-evident from the fact that we have heard the case over the last three days, and we have had the final hearing.

36. The Tribunal, in terms of prejudice to the respondent, also note that this is not a case whereby it is a 'he said, she said' type of incident where it is crucial for memories to be fresh. The core of the respondent's case is on the documents created at the time, the actual audits and their standard procedures and processes.

37. The respondent says that the fact that there is no explanation as to the delay should be enough to tip the balance against granting an extension. The Tribunal are persuaded by that. It is for the claimant to show that it would be just and equitable to extend and the Tribunal do not consider that the claimant has. The Tribunal stress that they have looked at the evidence before them in this regard and that submissions are not evidence in their own right.

38. The Tribunal come back to the fact that there is no explanation for the delay between April and May with regard to the original time limits and the Tribunal note that time limits are put in place for a reason. The Tribunal stress that we do have a wide discretion to extend time, however we must be satisfied that it would be just and equitable to extend and we are not. Therefore, there is no jurisdiction for the Tribunal to hear the race discrimination claim and the claim is dismissed on that basis.

<u>Race discrimination</u>

39. The Tribunal have heard the evidence in relation to the race discrimination claim and despite the fact that the claim is out of time make the following findings on the merits of the case.

40. By way of background the claimant is employed by the second respondent who provides cleaning services to the first respondent at their Borehamwood site. This site consists of both a warehouse and offices. The claimant was responsible for cleaning the offices and his comparator was responsible for cleaning the warehouse. There are monthly audits on the standard of cleaning at the site which involves a walk around by a member of each of the respondents' team. The cleaners' hours of work were reduced in February 2021 from 7 to 4 hours. The claimant's case is that Yodel's site manager Shamiza Akbar failed his audits but passed his comparators cleaning. The claimant states this is because Shamiza and his comparator Ratan are from the same geographical region in Asia, but he is black African. The issues in the case are set out in the order of Employment Judge Bedeau from 23 March 2023.

41. The claimant's pleaded case is that both respondents, namely Loredana (employed by the second respondent) and Shamiza (employed by the first respondent) had colluded to fail his cleaning audits. It suggested by the respondent that the warehouse having also should have failed its audits is not part of the pleaded case. The Tribunal do not accept that because part of the list of issues under comparator, there is clear reference to Ratan's audits being passed. Therefore, it is understood that the difference between the two with one being passed and one not, was part of the collusion.

42. It is a matter of fact that there is an audit process that involves the claimant's line manager doing a walk around with a member of the Yodel team, in this case that was Shamiza Akbar. As part of the delegation to Shamiza, the process is overseen by Brendan who carries a pre-check walk around and would highlight areas of concern to Shamiza. The evidence of both Shamiza and Loredana is that they agree the scores between them. The scoring system is that green is a pass, amber is needs improvement and red is a fail. They say that there is little conflict on that because their evidence is that it is obvious where something is not up to standard and would fail. The Tribunal accepts that evidence. It would clearly not be in Lorenda's interests to go along with what Shamiza says and fail the audit as a matter of course because to do so would suggest that the service the company are providing is not sufficient.

43. Page 338 of the grievance meeting between the claimant and Brendan references both audits having failed, and that cleaning is poor in both the offices and the warehouse. The Tribunal consider that that is supported by the audits which show issues in both areas. It is noted that amber does not, in its own right, mean a fail but it does mean that it needs improvement. The Tribunal note that the audits fail as a whole. The reference by Brendan, we find, is reference to the audits failing for the whole site. There is not a separate audit for each area. It is a combined cleaning performance and if it fails, it fails overall. It is then for the second respondent to look at which areas would be failing and address that, subject to who is performing that task. Yodel are looking at the overall mark.

44. We also note the reference we were taken to the audits failed 'under my direction'. The claimant relies on this to support the fact that there is collusion because Shamiza has then not failed the warehouse. The Tribunal find that this was not a direction for Shamiza to have failed the warehouse area. We understand that reference to be that it is the task that is delegated to Shamiza, she acts under Brendan's direction and Brendan is in charge and has overall say. That is different to a literal direction for her to fail an audit.

45. The process is that after the audit has been completed by Loredana and Shamiza, it is then taken to Brendan, and he signs off each audit. You can see that from the audit itself because it is signed off by Brendan and the fact that he has overall say means that if he does not agree with the mark, he can change that mark. The process is that he does a walk around and if he is not happy that it has been marked correctly, he will have overall say. That would not support the claimant's contention that there is collusion by Shamiza because ultimately Brendan has overall say and could correct any false marks and he can then escalate that if needs. It is in fact noted from that grievance meeting that he references where it was escalated to a Regional Manager.

46. Shamiza's evidence, which was accepted by the Tribunal, and we note that it was not challenged by the claimant, was that she does not know who cleans which areas unless she sees somebody performing a specific task on the day. The Tribunal did note that the arrangement prior to the hours changing was actually that both cleaners cleaned both areas and there was only that split when the hours changed. As already stated, the Tribunal accept Shamiza's evidence that when she did the audits she would not have known who had done the cleaning. That is supported by the fact that it is noted that each of the cleaners will cover each other during periods of absence. Further, Shamiza does not work for the claimant's employer. She therefore is not involved in his rota, not involved in his holiday or sick pay and so would not know when the claimant had been in to perform the specific duties unless she had observed him.

47. The claimant has taken us to the walkways in the warehouse with an issue. This is demonstrated by the audits themselves which show an amber mark on at least four occasions, that is out of six audits that are before us between June and December.

48. We were also taken to page 263, and we do note that there are two red items next to kitchen/canteen. We do know that the canteen is part of the warehouse and it suggested that that demonstrates that there was a red failure on the warehouse. In that regard the Tribunal note that there are also two kitchens within the office area; the score is marked against kitchen/warehouse and therefore the Tribunal is simply not in a position to make a positive finding that there was a red failure against the canteen because we do not know whether that red mark relates to kitchen (which may be part of the office) or canteen (which is part of the warehouse). That page

was put to the claimant, and we note that he said all the red areas were in fact his areas.

49. The panel find that the claimant does not identify any other particular areas of concern, save for the yard. That was put to him in cross-examination, and he accepted that he had not mentioned any other areas other than the walkway but says that does not mean that there was not a problem.

50. From the evidence, the respondent acknowledges that that is an area which requires improvement. It is not however a fail. What the claimant has not done is adduced any evidence that the other areas were poor other than the walkway which is acknowledged as being poor.

The law – direct race discrimination

51. Section136(2) Equality Act 2010 provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

52. We have taken into account the well-known guidance given by the Court of Appeal in Igen Ltd v Wong [2005] ICR 931 which although concerned with predecessor legislation remains good law. It was approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054. Ayodele v Citylink Ltd [2018] ICR 748, CA confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in Igen Ltd.

53. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground. The consequence is that the claimant will necessarily succeed unless the respondent can discharge the burden of proof at the second stage. However, if the claimant fails to prove a ''prima facie" case in the first place then there is nothing for the respondent to address and nothing for the Tribunal to assess Ayodele and Hewage.

54. At the first stage of the test, when determining whether the burden of proof has shifted to the respondent, the question for the Tribunal is not whether, on the

basis of the facts found, it would determine that there has been discrimination, but rather whether it could properly do so.

55. The following principles can be derived from Igen Ltd v Wong (above), Laing v Manchester City Council [2006] ICR 1519 EAT, Madarassy v Nomura International p/c [2007] ICR 867, and Ayodele v City link Ltd (above); which reviewed and analysed many other authorities.

56. At the first stage a Tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant, and it may also properly take into account evidence adduced by the respondent when deciding whether the claimant has established a prima facie case. A respondent may, for example, adduce evidence that the allegedly discriminatory acts did not occur at all, or that they did not amount to less favourable treatment, in which case the Tribunal is entitled to have regard to that evidence.

57. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic and a difference in treatment. That would only indicate the possibility of discrimination and a mere possibility is not enough. Something more is required, see Madarassy (above).

58. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (Hewage v Grampian Health Board [2012] IRLR 870, SC.)

59. The prohibition on discrimination against employees is found in section 39(2) Equality Act 2010. Employers must not discriminate:

    59.1. in the terms of employment;
    59.2. in the provision of opportunities for promotion, training, or other benefits;
    59.3. by dismissing the employee;
    59.4. by subjecting the employee to any other detriment.

60. Section 13 Equality Act 2010 states:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

61. The claimant relies on race as his protected characteristic which is covered by s9 of the Equality Act.

Conclusions on direct race discrimination

62. Applying the burden of proof as outlined at s136 above, in the first instance the claimant has to prove facts on the balance of probabilities from which the Tribunal could conclude that he is treated less favourably because of his protected characteristic. If the claimant does not meet that initial threshold the claim fails and the claim has to be dismissed. It is not enough for the claimant to show he has a difference in status and that there was a difference in treatment. There has to be something more.

63. For the claimant to show that there was collusion to fail his audit, he bears that initial burden. He must show that there was collusion by Loredana and Shamiza to fail him. Collusion, by its very definition, has to involve a deliberate act. Both Shamiza and Loredana gave clear evidence that they judged the audits on what was in front of them, and the panel accept that evidence. That suggests that the failed audit is marked on the assessment of the cleaning, as is observed by them and not based on collusion. That standard of cleaning is evidenced in the audits themselves (pages 355-364) which are supported by photographic evidence (pages 284-293). The photos show a level of poor cleaning. The procedure then has a further cross-check in that it is overseen by Brendan and that if Brendan is not happy with the marks based on his walk around, he can correct it.

64. The claimant, on his own evidence, accepts that the standard was poor. This is not a case where the claimant is saying the standard of cleaning was actually good and they have deliberately failed him. The claimant has accepted the standard was poor which led to the failures, and he says he is failing because he didn't have enough time to complete the tasks there having been a reduction in his hours.

65. In the grievance appeal letter at page 342 the claimant says 'I did not say that I was not happy with the result of Shamiza's audits'. Ultimately, therefore, the claimant does not take issue with the marks that he was given. How, therefore, can there be collusion to fail him when he accepts he should have failed. The fact that there is no collusion is also supported by the fact that Shamiza does not know who cleans which area unless she has seen that happening, so she could not have deliberately failed the claimant and deliberately passed Ratan.

66. The witness evidence, the documentary evidence and the claimant's own agreement to the fact that the mark was the correct one is such to support that there can be no collusion to deliberately fail him.

67. Addressing the issue of the warehouse, the claimant's case is that that should have failed also and that was part of the discrimination against him. For the claimant to demonstrate that that is the case, he would have to provide some evidence that there was the same poor standard in the warehouse, such that the warehouse should have failed too. The claimant, as I have already said, only takes us to the walkways to support a poor cleaning standard. The walkways are noted as amber on four out of the six audits we have seen and that supports that there was an issue in line with what the claimant is saying. However, that was an issue that required improvement (as an amber mark)

as opposed to failure (red mark). That also supports the fact that the respondent is not simply passing the warehouse on all issues. If it were a deliberate act to pass the warehouse and fail him, the question is, why has the warehouse been marked down at all and further why has the office not failed on more.

68. The panel have already made findings in relation to the January audit and that that was deemed a failure, albeit is noted as amber but it is noted from the February and March audits that they were passed. They were not failures, so if there was an attempt to fail him due to his protected characteristic, you might query why the respondent would not continue to fail him. Instead, the respondents acknowledged that there was an improvement.

69. The Tribunal do note that there was reference to the yard and that is understood to be a warehouse area, for which there is an amber mark in January 2022 which would indicate a problem with it. However, that does not take us any further forward in terms of there being other evidence presented by the claimant as to the standard of the warehouse that would warrant a fail. The claimant has not produced any evidence which would show that the warehouse was actually of such a poor standard that it should have failed rather than their simply being amber scores.

70. The Tribunal do note in relation to Loredana Mandache's statement, paragraph 121, as a result of problems with ambers in the warehouse, an improvement plan was imposed against Ratan and therefore in any event, it is not the case that they were not taking action against Ratan. They did and the evidence is that she improved as a result.

71. The claimant's case is that Brendan, as evidenced at page 338, says that both areas are poor and should have failed. The Tribunal do not accept that as sufficient proof that the warehouse should have also failed because Brendan had overall responsibility and he could have failed the audit if he got it back and his observation was that it was not up to standard. He had delegated that task to Shamiza and no doubt, if she were not carrying it out correctly, he would have taken action as manager of the whole site. What that discussion at page 338 does demonstrates is that, there was poor performance in the warehouse but on the evidence before us, it is amber and that is not the same as a red mark requiring a failed audit.

72. The Tribunal do also note the evidence of Shamiza who explained that the two areas are very different. The warehouse is a warehouse area where items are packed and collected; there are vehicles coming and going whereas the office is a naturally an office environment which would require more attention to detail when being cleaned. The Tribunal accept the evidence that allowances were made to each area for that reason.

73. In conclusion, for the Claimant to get over the first hurdle, he would have to provide evidence consistent with the fact that the warehouse should have also failed and he has not done so. There is no evidence to support that the quality of the warehouse was the same such that it necessitated the fail.

74. Therefore, the Claimant has not established facts from which the Tribunal could conclude that he was treated less favourably due to his protected characteristic and, as such, even if we had had jurisdiction, the claim would have failed.

Remedy for unfair dismissal

75. The Tribunal has regard to the schedule of loss at page 395 of the bundle.

76. There was some dispute over the claimant's start date for calculation of the basic award however the Tribunal note from page 125 that he was originally employed by Resource on the 10 May 2011. There was a TUPE transfer to ISF in 2012 and a subsequent transfer to the second respondent in 2020. As such we take the number of years of service as 11 years and one month, that being the period referred to in the schedule of loss. The claimant was over the age of 41 during those 11 years which means that he is entitled to 1.5 weeks' pay for each year. The weekly pay is £237.82. 16 weeks x £237.82 means the basic award is £3805.12.

77. In terms of the compensatory award, specifically loss of earnings, we do consider that the period of 16 weeks was a reasonable period in which the claimant was able to gain alternative employment and we reject the submissions made by Mr Underwood that the claimant would have been able to secure alternative employment within 12 weeks.

78. This is a period post-covid19 pandemic. It is known as a matter of fact that a number of businesses were struggling and having to make reduced costs. In relation to offices, even if not in lockdown, many were operating still at reduced capacity and the respondent's own client had indeed reduced their cleaning hours for that reason. The Tribunal consider that it is in that context and that background that the claimant was trying to seek alternative employment and although we have not been taken to any evidence of job applications within the bundle, we do accept that the 16 weeks in those circumstances was reasonable. Net pay after tax is £197.07 per week x 16 weeks is £2865.12.

79. The claimant gained new employment on 3 October 2022 however this was at a lower rate of £9.50 per hour instead of £10.00 per hour. He worked at this rate for a total of 197 hours with a total loss of £98.50 (197 x £0.50).

80. There is then loss of pension contribution for 16 weeks at £7.52 which totals £120.32 and is not challenged by the second respondent.

81. The miscellaneous costs in relation to the job search are also conceded and seems reasonable at £100.00 and we allow the same.

82. The claimant conceded that the cost of prescription tablets, whilst incurred, would not be a sum he could claim in relation to an unfair dismissal claim where, of course, we have no personal injury or injury to feelings element, so we have removed the £205.70 claimed.

83. There was then the loss of statutory rights in the sum of £500 claimed. We consider that an appropriate award given the length of service and again the second respondent took no issue with the same.

84. By our calculation, therefore, the total amount of £7489.06 broken down as follows:

    Basic award £3805.12

    Past losses £2865.12 for the 16 weeks

    Less income received £98.50,

    Pension contribution £120.32

    Job search costs £100

    Loss of statutory rights £500.00

The law – remedy

85. The Tribunal must consider, if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UKHL 8.

86. In undertaking this exercise, the Tribunal are not assessing what we would have done; we are assessing what this employer would or might have done. We must assess the actions of the employer before us, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24.

87. The question for the tribunal is whether the particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the claimant in any event had the unfairness not occurred.

88. The Polkey adjustment is only applicable to the compensatory award, not the basic award.

89. The tribunal must assess any Polkey deduction in two respects: 1) If a fair process had occurred, would it have affected when the claimant would have been dismissed? and 2) What is the percentage chance that a fair process would still have resulted in the claimant's dismissal?

90. Where there is a significant overlap between the factors taken into account in

making a Polkey deduction and when making a deduction for contributory conduct, the Tribunal should consider expressly, whether in the light of that overlap, it is just and equitable to make a finding of contributory conduct, and, if so, what its amount should be. This is to avoid the risk of penalizing the claimant twice for the same conduct (see Lenlyn UK Ltd v Kular UKEAT/0108/16/DM).

91. Further, the Tribunal may reduce the basic or compensatory awards for culpable conduct in the circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

92. Section 122(2) provides as follows:

"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

93. The EAT in *Optikinetics Ltd v Whooley 1999 ICR 984, EAT*, held that S.122(2) gives tribunals a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal and that this discretion allowed a tribunal to choose, in an appropriate case, to make no reduction at all.

94. Section 123(6) then provides that:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

95. To fall into this category, the claimant's conduct must be 'culpable or blameworthy'. Save in respect of the basic award, such conduct must cause or contribute to the claimant's dismissal, rather than its fairness or unfairness. Such conduct need not amount to gross misconduct (Jagex Ltd v McCambridge UKEAT/0041/19). It is also possible to make a reduction for contributory conduct even if, had the employer acted fairly, a dismissal would not have occurred at all (Wilkinson v DVSA [2022] EAT 23).

96. In assessing contribution, the tribunal should (Steen v ASP Packaging Ltd UKEAT/0023/13/1707):

1) Identify the relevant conduct;

2) Assess whether it is objectively culpable or blameworthy;

3) Consider whether it caused or contributed to the claimant's dismissal; and

4) If so, determine to what extent it is just and equitable to reduce any award.

97. A helpful framework for addressing the related issues of contributory conduct and a Polkey reduction was provided by the EAT in *Dee v Suffolk County Council EAT 0180/18*. His Honour Judge Barklem observed that the tribunal should first consider what decision the employer's disciplinary panel would have reached on the issue of whether the claimant was guilty of gross misconduct and/or lesser misconduct had a fair procedure been followed. If it determined that he would have been found guilty of gross misconduct or misconduct, it should then decide what sanction the panel would have imposed. Each factor that was relevant to the tribunal's determinations should be identified and its effect explained. Naturally, the outcome could not be expressed other than by reference to a percentage reduction, but it was important that the basis for this was set out. A similar exercise should then be carried out in relation to the reduction for contributory fault, and confirmation given that the tribunal had 'stood back' and looked at the matter as a whole in order to avoid any double counting and ensure that the final result was overall just and equitable. If a different percentage was to apply to the reductions in the compensatory and basic awards, the basis for that conclusion should also be set out. Finally, as regards consideration of whether a percentage uplift or reduction should be made to the award of compensation on account of breach by the employer or employee of the Acas Code on Disciplinary and Grievance Procedures, full reasons should be given in relation to each of the alleged breaches; and should the tribunal conclude that such breaches were not unreasonable, its reasons for this should be given also.

Conclusions – deductions

98. In applying Polkey, we do consider that if a fair process had been undertaken looking at the schedules of tasks, what the claimant was saying in relation to the fact that the frequency had not changed, would have been taken into account. That would have likely resulted in him having an amended schedule and possibly an opportunity to improve by way of performance improvement plan. Indeed, Ratan was given an opportunity to improve.

99. That being said, the Tribunal also note the evidence of Mr Alecock that it was not just an issue of frequency, that there was also the issue of reduced

occupancy of the offices and that he also had regard to the fact that a number of Yodel sites were operating under a similar four hour regime, with the work being completed without issue.

100. The Tribunal acknowledge that at the time of the dismissal the claimant was on a final written warning. A written warning had been issued because of his failure to empty bins on site. The final written warning had then been issued because of his conduct towards a manger when she came to observe him in a time and motion study which was linked to his grievance that the work could not be completed in the 4 hours assigned.

101. The claimant's representations as to the warnings was that the first one was unfair and so he should never had been on a final written warning. We cannot, as a Tribunal today, make any findings in relation to the fairness or otherwise of those warnings. Procedures were followed and we do not know whether the claimant did appeal the written warning. Our understanding was that he did and that was not actioned further, and he continued to work for the respondent it having been issued.

102. What we can observe from the evidence, however, is that the final written warning related to conduct with another manager, and that was the lady that went to observe the claimant in a time and motion exercise. A final written warning was issued in relation to the claimant's conduct in that regard and, whilst we are not making any findings as to the fairness of it, what we do observe is that the claimant's conduct in relation to that, is likely to have been fuelled by the process as a whole. That process being his grievance and his continued assertions that the frequency on the schedule had not changed and which, as a matter of fact, as a Tribunal, we can see from the two schedules had not changed. If a fair process had been carried out this is likely to have been considered.

103. On his own admission, however, the cleaning standard was very poor and that is evidenced within the photographic evidence and from the second respondent's perspective the claimant was on a final written warning when considering the sanction of dismissal.

104. For those reasons we do consider that there was a 25% chance that had the second respondent carried out a fair procedure, the claimant would have been dismissed in any event. We put that at the lower end because despite the final warning we do consider that had the issue about the frequency of the cleaning having not been changed been properly investigated there is a chance a performance improvement plan may have been implemented.

105. By our calculation the Polkey reduction reduces the compensatory award by £920.98, that being 25% of £3683.94. That leaves a total of £2762.96 which when added to the basic award of £3805.12 leaves a total due to the claimant of £6568.08.

106. Applying s122(2) ERA 1996 the Tribunal do not consider that there is conduct by the claimant such that it would be just and equitable to reduce the basic award. Although there is a poor standard of cleaning and the claimant was on a final written warning, we have provided our observations above on the final written warning and the circumstances in which it was issued. We also take account that the claimant's continued concerns about the frequency on the cleaning schedule having not changed were not considered. In those circumstances we do not consider it just and equitable to reduce the basic award.

107. Applying s123(6) ERA 1996 the Tribunal do have regard to the fact that any conduct relevant here has already been taken into account when assessing the Polkey deduction. In those circumstances the Tribunal does not consider that it is just and equitable to make a further reduction to the compensatory award.

Employment Judge A French

Date: 22 May 2024

Sent to the parties on: 24/06/2024

For the Tribunal Office.

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