Case No: 3311198/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr M Muhammad

Respondents: Stericycle SRCL Ltd (1)
Shred-It Ltd (2)

Heard at: Reading **On:** 30 September – 3 October 2024

Before: Employment Judge Anstis
Ms A Crosby
Mr F Wright

Representation
Claimant: In person
Respondent: Mr D Patel (counsel)

JUDGMENT having been given during the hearing on 3 October 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. In this decision we will refer to the second respondent, Shred-It Limited, as the respondent. At an earlier hearing the claimant had accepted that he was not employed by the first respondent and had no claims against it.

2. The claimant was employed by the respondent as Strategic Sales Executive. This was a senior sales position, selling the respondent's services to major organisations across Europe. During his employment, up to the events we will refer, to he reported to Rachael Alpha, who was then the Senior Vice President of Sales and Marketing EMEAA. From 1 April 2023 he reported to Duncan Brown.

3. Following withdraw of some of his claims, the claimant's remaining claims are of unlawful race and sex discrimination and unfair dismissal. For the purposes of his race discrimination claim the claimant describes his skin colour as

"dark" and his national origin as Egyptian. The discrimination claims are (in date order):

a. Duncan Brown reported the Claimant's expenses claims choosing not to discuss them or highlight them to the Claimant first, and

b. That the Compliance Team investigated and interrogated the Claimant without warning in relation to allegations of conflicts of interest. In this context, the "Compliance Team" means Carla Wilson, who was Senior Director Ethics and Compliance EMEA.

4. For both claims the claimant relies on actual comparators, giving for the first claim a short list of individuals (including Mr Brown) who he says are white and British and who he was treated less favourably than, and in the second claim he says he was treated less favourably than Rachael Alpha.

5. The respondent accepts that the claimant was an employee, was dismissed and has sufficient length of service to bring an unfair dismissal claim.

THE FACTS

The Sale meeting

6. The respondent set up a EMEA Commercial Team meeting to take place at its head office in Sale on 1 February 2023. For those who had to travel this would include an overnight stay in a nearby hotel the night before.

7. On 31 January 2023 the claimant drove to the hotel. He drove his car from his home in Reading to Rachael Alpha's home in Winchester. He left his car there, and drove Ms Alpha's car (with Ms Alpha as a passenger) to the hotel. The return journey was done in the same manner the following day.

The expenses claim

8. On 24 March 2023 Ms Alpha's manager, who was based in the USA, held a Teams meeting with Ms Alpha's team (including the claimant and Mr Brown, who at that time also reported to Ms Alpha) to notify them that Ms Alpha would be leaving the business the following week, on 31 March 2023. As part of the subsequent rearrangement, the claimant would report to Mr Brown.

9. For our purposes one of the things that matters that resulted from this was Ms Alpha encouraging her team to make any outstanding expenses claims before she left, so that she could authorise their expenses before she left.

10. It appears that the claimant had some difficulty in making his expenses claim. He told us that despite having been employed at that point for almost two years, it was the first expenses claim he had made, and it appears that the respondent had also recently changed to a new process for claiming expenses.

11. The claimant later suggested that he had tried to submit the relevant expenses earlier, but for now we note that on 28 March 2023 the claimant's expenses claim was rejected on the basis that the expenses claimed were more than 30 days old.

12. The claimant replied to this the following day, copying in Ms Alpha and saying "*I have been trying to submit my expenses a few times for the last few months, and I was under the impression that it should be automatically submitted once I have clicked saved. After clicking save, the page doesn't give me any confirmation, nor do I receive any confirmation emails. I need your help to submit my expenses.*"

13. Ms Alpha took up the point, saying: "*Please see Majid's email below. I have experienced similar issues and my expenses were rejected yesterday for having no attachments even though I had uploaded 14 documents ... Please can you confirm that Majid Muhammad's and my expenses have been approved for processing.*"

14. A member of the team dealing with expenses replied to Ms Alpha, saying "*Upon reviewing Majids Report, I am seeing a couple issues. Have you reviewed and approved this report yet? The reason for my asking is that his report is in a pending status, meaning the workflow should have not have been triggered yet. However I do remember this report coming up for Audit. The reason we are unable to process his report is, Per Stericycle policy Cash expenses must be submitted within 30 days. Majid is expensing as far back as July of 2022.*"

15. This email included a table setting out at least part of the expenses claimed by the claimant, showing a claim for 200 miles travel on 1 February 2023 and a 200 mile return journey on 2 February 2023. Although the dates are slightly wrong there is no doubt that this relates to the EMEA Commercial Team meeting on 1 February 2023. It shows that there was one passenger. It has never been in dispute in this case that the person entitled to make the claim was the person whose car was used, not the person who drove.

16. Ms Alpha replied: "*In Majid's case, I did see the expenses and spoke to him and said he has one opportunity to clean up his historic expenses, after which he would need to be within the 30 day guidelines. If there is no way you can approve these dates within your system, I can ask him to go back and make two applications, one for resubmission and one for AP.*"

17. The relevant team member replied, saying "*I can go as far back as November 1st in the SP system, anything prior he would have to submit with AP. Please have him submit a "New" claim I will cancel the claim that was just submitted.*"

18. As far as we can tell the claimant did this and resubmitted his expenses on 30 March 2023. Ms Alpha indicated her approval of the expenses by email the

same day, and repeated that approval later the day when asked to use a particular form of words.

19. We have then seen a chain of emails within the expenses team, and on 31 March 2023 the claimant was asked for more detail and supporting documentation on various points (but not the journey to Sale). Later that day he provided at least some of the information or material that was asked for.

The settlement agreement

20. The ending of Rachael Alpha's employment was the subject of a settlement agreement containing confidentiality clauses. She wished to give evidence at this hearing and there was at least at first a dispute about the extent to which she could do so given the confidentiality terms. After further discussion, Ms Alpha and SRCL Limited (for whom Mr Patel said he was authorised to speak for this purpose) agreed to waive any confidentiality provisions for the purposes only of evidence to be given at this hearing. For the purposes of our decision we find the following:

    a. The agreement was dated 3 April 2023, recorded a termination date of 31 March 2023 but was signed by the respondent only on 26 April 2023 (Ms Alpha having signed it on 12 April 2023). Ms Alpha says that although it was signed by the respondent on 26 April they only provided her with the signed copy the following day, but nothing depends on that.

    b. The agreement contains provisions for Ms Alpha to make herself available to the respondent in respect of "*any administrative, regulatory, investigative, litigation, judicial or quasi judicial proceedings or other legal matter(s) that may arise*".

    c. Negotiations in respect of the settlement agreement were dealt with outside the UK, by the respondent's US head office. None of the respondent's witnesses who gave evidence before us know of the settlement agreement or its terms, or knew anything more than that Rachael Alpha had left the business on 31 March 2023.

    d. Senior members of staff in the US remained in contact with Ms Alpha for the purposes of negotiating the settlement agreement but also after the settlement agreement had been signed.

The initial report

21. On 5 April 2023 Mr Brown, who was by then the claimant's manager, received a call on Microsoft Teams from a member of the expenses processing team. She asked him to review the claimant's expenses claim, and sent him a link to the document containing the claim. It has never been explained why she did this.

22. Having reviewed the expenses claim, the following day Mr Brown wrote to Ms Wilson, saying:

> *"The claim below was forwarded to me yesterday for review by … the T&E team in Chicago.*
>
> *My concern is with the mileage claim for Feb 1st and 2nd 2023 for the round trip from Home to Sale Office.*
>
> *I was at the same meeting and pulled into the carpark at the hotel at the same time as Majid. He was with Rachael Alpha, driving Rachael's* [car] *...*
>
> *He is therefore claiming mileage reimbursement for a trip that was not done in his own car."*

23. There has been some argument over whether the respondent's written procedure requires this to be reported to the OEC (Office for Ethics and Compliance, of which Ms Wilson was a part) or HR, or both, and what should follow after that. Nevertheless it does seem to be accepted by the claimant that at least according to the respondent's documented procedures, if Mr Brown had a concern over the expenses, he could raise that with Ms Wilson. The claimant's point was that notwithstanding the documented procedures that was not in fact what happened. He says the norm would be to check the point with the employee first, and that at least part of the reason why Mr Brown did not do this was the claimant's race and sex.

24. The claimant has named a number of comparators in respect of this, including Mr Brown himself, but by the end of the hearing we had no evidence of any specific instance of a suspected false expenses claim being raised with the employee themselves before being referred elsewhere.

25. Ms Wilson recorded this report on the respondent's case management software, "EthicsPoint". In doing so she suggested that she was the appropriate person to investigate the matter, although triaging and assignment of these reports and subsequent investigations was a matter for the respondent's head office in the USA. She was assigned to investigate it. As Ms Saunt later explained to us, it was normal for matters relating to "business integrity" to be investigated in the first instance by the OEC, and this was a matter relating to business integrity.

The second report

26. It seems that Mr Brown learned that this expenses claim had earlier been approved by Ms Alpha, despite the fact that she must have known that the claimant did not drive his own car. On considering that, Mr Brown developed further concerns, and on 11 April 2023 he spoke to Ms Wilson raising further concerns. Ms Wilson says that:

> *"Duncan Brown reported to me that on 13 March 2023, the Claimant and Rachael Alpha had attended a Webex meeting titled 'UK / Ireland Interview Preparation – Option 1' from Rachael Alpha's home. Duncan Brown claimed that he had concluded this due to the distinctive features of the background location in the video and the mug that the Claimant was drinking from, which Duncan Brown stated he had seen Rachael Alpha using previously. As Rachael Alpha was the Claimant's line manager at this time, I became concerned that there might be an undisclosed conflict between the two. Accordingly, I added the potential conflict of interest as a secondary issue to the case in the Ethicspoint system on 11 April 2023."*

27. This became known as the "conflict of interest" allegation, or occasionally the secondary allegation, in contrast to the expenses issue that was the primary allegation.

The investigation

28. Ms Wilson goes on to say:

> *"Considering that there were two allegations against the Claimant, I discussed my approach with Stericycle's legal team and decided to keep the two allegations as two separate investigations. However, because of the potential overlap, I decided to deal with them in the same interviews and investigation report, but to clearly signal that they were separate matters by referring to the mileage claims as the 'primary allegation' and the Conflict of Interest Allegation as the 'secondary allegation'."*

29. In mid-April the claimant chased payment of his expenses and was told that they were being processed. The first he would have known of any problem was when Ms Wilson sent him an email on 24 April 2023 saying:

> *"The OEC would like to meet to discuss some irregularities detected in your recent expense submission. This will be a video call. Please be somewhere quiet and private; ideally at home. There is no need to prepare anything in advance."*

30. This first investigative call took place on 27 April 2023.

31. The notes of the call include the following (and we take this from the original unedited notes, not the edited notes that were later used in the disciplinary process):

> *"CW asked if MM remembered a sales team meeting on 1st and 2nd February 2023 … and MM confirmed he did. CW asked him how he arrived there and MM answered he arrived driving. CW asked if he was driving his own car and CW answered that he believed so, yes. He*

then recalled he met with RA and they drove in her car because there was not enough parking in the office and the hotel ... CW asked if he meant parking was an issue at the hotel or at the office, and MM responded, both.

MM explained he drove all the way from home and parked around the area because he didn't remember where the place was and that he has a RingGo app where he can find parking spaces. So he parked his car somewhere then he met RA the same day. He said he could send the parking booking from the application.

…

CW asked what car he drove and MM answered with registration (matching T&E submission) and the model. CW asked MM to go over again what he shared regarding RA picking him up from a nearby parking space and MM said he didn't park at the hotel because he didn't know how to get to the hotel. He then stated he didn't park at the hotel because there was a golf event on. He then stated he parked his car at the hotel, went in and was told that because there was a golf event on, he could not park there. He stated he has got a RingGo app which states the point RA picked him up because she knew the road. MM said he drove to the hotel in his car. Then he said he did not. Then he said he parked close by using the RingGo app, RA asked him where his location was and then RA picked him up and they drove to the hotel together. CW points out that he's giving different accounts of the chain of events.

CW asked MM to think over and try to remember what the answer is as it was unclear and contradictory. MM said he drove to the hotel, arrived before RA, parked somewhere nearby, told RA he's parked away from the hotel who asked where he is, he told her where he was, explained the hotel was busy and there were not enough parking spaces due to the golfing event, and she picked him up. And the next day he drove RA's car to the office.

CW asked if he could check the RingGo app to confirm. After saying he didn't have the phone with him, CW asked him to go and grab it as we could wait. MM returned after a couple of minutes with the phone, checked the phone and said it was not showing in his recent parking. MM said it could be another app, not RingGo.

CW asked seem what other apps he could have used, like Just Park but MM said he didn't remember. CW asked if he had expensed the parking and MM said he hadn't as he doesn't expense all. CW asked him to check the email confirmation of the parking session as there should be an email there. MM said he would. MM continued looking at

phone for approx. 1 minute but was unable to find evidence of the parking session.

CW asked how he knew there was a golf event going on and MM said he went to the hotel and asked the hotel for parking and they said it was busy and it's not easy to park. CW asked MM if he knew of someone else who had parking issues as RA arrived later but was able to park. MM said RA waited for 10-15 minutes until somebody left to get a parking space.

CW explained that, in the T&E claim, MM said there was an additional passenger. MM said he could not remember who it was. He then said there was probably nobody else with him and it would be a copy paste issue because he used a previous form and made a mistake.

…

CW summarized what MM said as following: He arrived at the hotel on the 31st of January in his own car, spoke to the hotel, they said there was no parking because of a golf event, parked 5 min away then called or messaged RA, she picked him up and they drove together to the hotel. MM confirmed the summary was correct. CW asked if RA drove MM to the hotel and he said yes. CW asked MM again who drove RA's car to the hotel because we have a witness who saw him and RA arrive and he was driving. MM stated he drove. CW asked which it was and he MM explained that he went out and drove her car because she was exhausted and because he doesn't drink. CW said she doesn't understand why RA would get out of her car and ask MM to drive for the 5 minute journey to the hotel. MM said he doesn't know. CW also asked if he is insured to drive RA's car and MM said he didn't think so. CW asked if he had driven it before and after a long break, he said he might have done so in the past once.

…

CW asked if he had you ever been to RA's house and MM answered, after being silent for a some seconds, he hadn't been as far as he remembered, not in the house. He said he had picked her up from outside the house. CW asked if he had ever been inside and MM answered he hadn't. CW encouraged him to be open and transparent as the best option. MM repeated he hadn't been in her house. He explained that the team is flexible when it comes to where they meet and how they meet.

…

CW explained that on that call on March 13th when he turned the camera on, he was drinking from a distinctive mug and asked if he remembered it. MM said he didn't remember ...

CW explained that the cup has an "U" on it, MM says, "yes". CW asked MM if he used it a lot. MM said he didn't remember and he could have been anywhere and that he does not have that cup at home. CW repeated that there were beams in video shot and the cup with the "U" so maybe this could trigger his memory of where he was working that day. MM repeated he could have been at his house or at a neighbor's house or a an equestrian centre.

CW explained she was going to ask a very direct question and asked if there was a COI with RA that MM would like to disclose. MM said there wasn't any ...

CW requested one last time to see the wooden beams MM has referred to in his house. MM explained that he would send a video later. CW asked if he could show the current room by flipping the camera around but MM said he wouldn't. He said he was not challenging the investigators but it was not a good moment.

…

MM agreed to show the room he was in. Initially he had the blurred background on, then he removed it and showed the investigator the room where he was and opened the door to show part of the house.

…

Finally, CW summarized that MM changed his mind a lot regarding where he was working from on 13th March from home to a neighbour's to not remembering, and shared that after changing his mind a lot of times, it was unclear what his final position was on his whereabouts. MM said he didn't remember where he was. CW thanked him for his time and said the investigators would be waiting for him to send the info over. CW reminded again on items agreed to be sent."

32. The second of the claimant's discrimination complaints relates to this meeting and is that Ms Wilson "*investigated and interrogated the Claimant without warning in relation to allegations of conflicts of interest*". Whether there was "interrogation" is disputed by the respondent, but it is certainly the case that the claimant was "*investigated … without warning in relation to allegations of conflict of interest*".

33. In this respect the claimant contrasts his treatment with that of Ms Alpha. If there was a breach of the conflicts of interest policy then both the claimant and Ms Alpha would have been liable for it, but as the claimant points out, Ms

Alpha was never subject to any investigation in respect of this at all, still less "*investigation and interrogation without warning*". Ms Wilson's response to this is that Ms Alpha was not investigated because as far as she (Ms Wilson) knew, Ms Alpha was no longer an employee of the respondent by the time of the allegation or investigation.

34. At least in respect of the primary allegation – the expenses – the claimant later accepted that he had lied during this meeting. It is apparent from the notes that Ms Wilson was not at all convinced by the claimant's lies, and that the lies did not give any coherent picture of how it was that the claimant apparently drove in his own car to Sale but arrived at his destination driving Ms Alpha's car.

35. The same day, the claimant sent an email to Ms Wilson saying:

> *"Thanks for your time today; I will send a few emails with what we agreed on during our discussion.*
>
> *Please find the email communication regarding the meeting, the parking spaces will be limited, and you can see my confirmation to drive.*
>
> *Will be sending the rest asap."*

36. The "*email communication*" was a chain of emails arranging the Sale meeting, during the course of which the claimant had said "*I will be driving*".

37. Later that day the claimant sent Ms Wilson a video he had taken of the inside of his house. Ms Wilson pressed him for details of the RingGo or other parking app he had used and of the call he had mentioned to Ms Alpha. The claimant replied saying he could not locate any parking receipt and that the call was too old to be still recorded on his phone. He also suggested that he may have been using his personal phone rather than work phone.

38. Ms Wilson pressed the point, asking:

> *"If it was your personal phone, an easy solution will be for you to send over the bill covering that period. Could you send that over please?"*

39. The claimant replied, saying:

> *"If I had any proof of the parking, I would happily share it, and I would have claimed it; as you can see, the rest of my expenses have receipts/invoices; the other thing is the parking. It could have been an app relevant to that area that I have used it once or cash on the machine. I can't recall the day, as I mentioned. If I had proof of it, I would have claimed it.*

> *Apologies, but sharing my personal phone calls is a step too far, and I'm not sure where this is going; you could probably ask Rachael, and please let me know if I can help in any other way.*
>
> *If that line of expense is causing the issue, please eliminate it from the rest of the expense report; from the history of my expense submission, you can have enough evidence there was no attempt to cause any confusion."*

40. Ms Wilson says:

> *"After the First Investigation Meeting, I conducted further investigations to see whether there was any truth to the Claimant's account, such as whether there had been a parking issue and/or a golfing event at the Hotel at the relevant time. As part of these investigations, I collected additional witness statements from Duncan Brown and* [another colleague] *and accounts from the Events Department and the Golf Club at the Hotel, all of which contradicted the Claimant's version of events."*

41. Ms Wilson continues:

> *"I wanted to share my findings with the Claimant in order to give him the opportunity to provide more context and to reflect on and correct his version of events if he wanted to do so. I was made aware that the Claimant was going on annual leave for 10 days from 29 April 2023 so I invited the Claimant via email to a second investigation meeting on 28 April 2023 to be held via Microsoft Teams (the "Second Investigation Meeting"). The Claimant initially declined the invite stating that it was his last day before annual leave so he was too busy. He instead suggested that we meet on 10 May 2023. I informed him that the investigation could not wait and reached out to his manager, Duncan Brown, who confirmed that there was no reason that the Claimant could not speak with the OEC at this time. As a result, the Second Investigation Meeting went ahead as originally proposed on 28 April 2023."*

42. The (unedited) notes of that second investigation meeting record the following:

> *"CW said she saw the email where MM said he was not comfortable sharing information from his personal phone. CW explained that if the personal phone was used for work purposes, he should share the info but also said we would be flexible and asked if he could share only a screenshot of that one line item instead. MM answered he would not do it because he considers it personal. He suggested the investigators pursue a legal route if they wanted to have access to it ...*

CW recalled the golfing event MM mentioned in the previous interview and explained she had checked with other TMs who stayed at the same hotel and none recalled there being an issue with parking. MM said he didn't know why the rest didn't recall it. MM said it depends what time they arrived and he can't remember when he arrived. He had received an email saying there were not many spaces available and that was what the reception said. CW explained that the email MM shared with the investigators the day before … was referring to parking limitations at the Sale office, not the hotel. MM said he read it as it was the hotel and he couldn't remember. He said he had asked the hotel if there was place to park. CW asked if he asked in reception and MM said he did and reception said there was a golf event on. CW explained that she had reached out to the hotel and they had confirmed there was no golfing event that day that would have created a parking issue. MM said he didn't know why reception said that. Maybe it was a wrong response from reception. CW explained there was no other event that day. MM said that's reception, not him and they said there was a golfing event to him.

CW added the investigators had also credible witness who was at the Sales event who recalled a conversation they had with RA who had said MM had driven up from Reading together with RA and she was on calls all time because you drove … CW asked if it was true that he drove from Reading with RA and MM said it was not true.

… CW shared there was a credible witness who was at the sales event … and they recall a conversation with RA where she had said that there is going to be a long ride home and her and MM would take turns. CW asked MM if they travelled together.

MM said no and that it's a question between RA and that person. MM stated RA dropped him to his car and he drove his car home. MM stated he did not drive back to Reading with RA.

CW asked MM, after having time to reflect, if he recalled where he was working from on March 13th and MM said "I wouldn't know" and he didn't remember as he works in different places. He mentioned he's got another studio where he works from and it has wooden beams.

MM said that if that conversation is opened, all the parties need to be involved. He explained he had no idea if the investigators were doing it but asked to please include RA in the discussion if she wasn't included already. He continued explaining that the investigation is missing one party and if she was not involved the investigation would be incomplete.

…

> *MM said he didn't know what else he could do. If there was a disciplinary action, he asked the investigators to please do it. He said he was open when it comes to this and wanted to move on."*

43. As has been noted, the following day the claimant went on annual leave, and he was signed off sick from work from early May 2023.

44. Ms Wilson continued with her investigation, interviewing or re-interviewing some of those who had been at the Sale meeting. She investigated the claimant's work phone records, which did not show the phone call he had referenced. She found that Rachael Alpha had herself claimed mileage for the journey (with one passenger).

45. On 5 May 2023 Ms Wilson sent an email to the claimant in response to him questioning progress on the investigation. She said:

> *"This investigation is still ongoing therefore we do not have any findings to share at this point. All internal investigations follow Stericycle policies to ensure a thorough, fair and objective process. Because each investigation is unique, Stericycle cannot promise a specific end date in any given circumstance.*
>
> *I have not been in touch because you are out of the office but as you have reached out, I would like to let you know that a follow up meeting is required when you return to work. I will schedule this upon your return."*

46. However, Ms Wilson describes a different approach in her witness statement:

> *"Following careful review of the evidence, I was satisfied that there was more than enough evidence to conclude the investigation and to substantiate the allegation that the Claimant had deliberately claimed mileage for journeys that he had not driven. I therefore decided that a further meeting with the Claimant was not necessary, although I did reserve the option to speak with him again just in case there was any subsequent developments."*

47. She explains it this way:

> *"I was then informed that Claimant's sick leave had been extended until 2 June 2023. In light of this delay, I decided to close the investigation because, as I explained … I considered that there was more than enough evidence to substantiate the primary allegation.*
>
> *In that context, I did not consider that a further investigation meeting with the Claimant would change the outcome of the investigation."*

48. Ms Wilson prepared and submitted her final investigation report to various members of staff including Alison Saunt (Director of HR for UK & ROI). This is

a detailed document, but we need only refer to the conclusions and one of the recommendations:

> *"Conclusions*
>
> *PRIMARY: MM deliberately claimed mileage for journeys not driven via the company's T&E process – Allegation substantiated*
>
> *Due to the considerable evidence available , the strong credibility of the witnesses, the lack of credible or inherently plausible answers given by MM and the lack of any corroborating evidence for his version of events, it is concluded on the balance of probability that MM deliberately claimed mileage for 2 journeys (one from his home in Reading to Sale and one from Sale to his home in Reading) which he did not undertake on his own behalf and in his car. None of the key components of MM's version of events could be substantiated. In addition, MM's inconsistencies when interviewed were notable, including his account of arriving to Sale in his own car and MM's inability to provide any documentation or other evidence to corroborate that he parked and was picked up by RA.*
>
> *MM demonstrated a lack of transparency and cooperation throughout the investigation process, even when presented with strong evidence to contradict his version of events.*
>
> *SECONDARY: MM had an undisclosed Conflict of Interest (COI) with his former Manager, Rachael Alpha (RA) – Allegation Unable to Substantiate*
>
> *There is insufficient evidence to conclude there was a COI with RA at the relevant time.*
>
> *Recommendations*
>
> 1. *HR to consider if disciplinary measures are appropriate (Owner: Alison Saunt) …"*

Disciplinary proceedings

49. At this point Ms Wilson handed over to Ms Saunt. On 5 June 2023 she wrote to the claimant (who remained off sick) saying:

> *"This is to inform you that the OEC fact-finding investigation you recently took part in has now concluded.*
>
> 1. *The allegation that you deliberately claimed mileage for journeys not driven was 'substantiated'.*

2. *The allegation that you had an undisclosed conflict of interest with your former manager was 'unable to substantiate'.*

This matter is now with the HR team to determine if further steps are necessary and they will reach out to with more information when they have had the opportunity to review the investigation."

50. The claimant queried why there was not to be the third investigation meeting that he had been expecting. Ms Wilson replied that "*HR is now your main point of contact. They will reach out to with more information when they have had the opportunity to review the investigation.*"

51. On 7 June 2023 Ms Saunt sent the claimant an "*invite to disciplinary hearing*", with the disciplinary allegation being "*alleged fraudulent travel expenses claim*". This included evidence and the investigation report and meeting notes prepared by Ms Wilson, except that these had been edited by a member of Ms Saunt's HR team to remove discussion of the conflict of interest allegation. The notes and report only referred to the expenses allegation ('substantiated') and not the conflict of interest allegation ('not substantiated').

52. The original disciplinary hearing was set for 9 June 2023.

53. In her statement, Ms Saunt says "*Once the Claimant received the invite to the Disciplinary Hearing and copies of the Disciplinary Evidence, I considered that he was seeking to delay and/or prevent the Disciplinary Hearing taking place.*"

54. Where this amounts to an attempt to delay or prevent the hearing taking place is a different question, but we do not believe the basic timeline is in dispute:

    a. The original hearing was postponed on the claimant saying he had a medical appointment and wanted a full copy of the investigation report and notes (which as far as we are aware were never provided to the claimant by the respondent).

    b. There was then a further postponement of a week while the claimant arranged for a companion to accompany him (although he was not in fact accompanied at the eventual disciplinary hearing). The hearing was rescheduled for 16 June 2024.

55. On 15 June 2023 the claimant (apparently having taken legal advice) sent to Ms Saunt:

    a. A data subject access request (which is not relevant for the purposes of this hearing), and

    b. The "apology letter".

56. About an hour before the disciplinary hearing on 16 June 2023 the claimant submitted a grievance and a letter from his lawyer (we are not concerned with the letter from his lawyer).

57. Apparently after having taken advice (or to allow time for her to take advice) Ms Saunt put back the hearing from 13:00 to 15:30 that day. The disciplinary hearing proceeded then. Ms Saunt says "*I considered that the Claimant's actions in seeking to reschedule the Disciplinary Hearing on multiple occasions, submitting a DSAR, sending the Apology Letter and the Grievance, were all carefully calculated and strategic steps made by the Claimant (with the support of legal advisers) to seek to delay and/or prevent the Disciplinary Hearing taking place once the Claimant had received copies of Disciplinary Evidence (and had realised the weight of the evidence in support of the disciplinary allegations)*".

The "apology letter"

58. The claimant does not accept the framing of this as an "apology letter", but that was how it was referred to in the hearing. We have discussed with the parties and agreed that the full terms of the apology letter do not need to be addressed in this decision and we can instead focus on matters that are relevant to our decision.

59. The letter starts "*I want to express my profound remorse and apologise for any misrepresentation I have given during this investigation process.*"

60. The claimant goes on to criticise the omission of the questions about the conflict of interest issue from the meeting notes he had been provided with. He says that in the context of the discussion about the conflict of interest he was told that "*I may have to provide messages and phone records from my personal phone, not my work phone*". He goes on to explain strong personal reasons for, amongst other things, objecting to examination of "*any personal messages*".

61. As regards the expense claim, he says "*The truth is that I drove to Rachael's house, and we car shared from her house to the offices. When I submitted the expense form, I claimed the entire journey instead of just the journey to Rachael's house. I accept this error, and I apologise wholeheartedly for it. This was an isolated incident. As I have said above, I am genuinely sorry for the inconvenience caused to the company.*"

62. We note the claimant's description of this as being an "error".

63. The claimant emphasises his clean disciplinary record, and objects to Mr Brown having raised the expenses matter with OEC, rather than directly with him (the claimant). He says "*I understand that standard practice within the company is to handle any expense concerns first between the employee and the line manager, and if there is an error, the employee will resubmit the*

expense claim. I understand that expense mistakes, and errors for sums which are much greater than £100, and even expenses submitted twice by mistake, occur every week in my business area." He goes on to name the comparators he relies on in his claim, saying they are British, and "*have made mistakes with their expenses, but this has been resolved with their line manager, without proceeding to any sort of disciplinary investigation.*" He says that they have been treated differently from him, and points out that Ms Alpha had not been interviewed as part of the conflict of interest investigation. He criticises Mr Brown's lack of communication with him during his sickness absence, although it seems to us that nothing in this case depends on whether Mr Brown did or did not communicate with the claimant during his sickness absence. He says "*In these circumstances, I am coming to the conclusion that a decision has been made to get me out of the company by isolating, bullying, and targeting me. I wish to formalise my grievances in this respect and I request for this to be investigated formally.*"

The grievance

64. Given those words, it is not surprising that his grievance touched on similar points. We set out below the headings he used in his grievance letter:

- Discriminatory failure to interview Rachael Alpha in relation to allegations relating to us both.

- Discriminatory treatment in relation to allegations relating to expenses.

- Failure to conduct a proper and fair investigation.

- Discriminatory exclusion and sidelining from the business.

- Failures within the compliance department.

65. As was pointed out during the hearing, the respondent's grievance procedure allows for grievances relating to or occurring during disciplinary proceedings to be dealt with in the context of those disciplinary proceedings, but Ms Saunt took a different view to that. In her oral evidence she said that on reading the grievance and considering it against the claimant's previous behaviour and what she considered to be his delay and avoidance in relation to the disciplinary hearing she considered that it was not made in good faith. Since the grievance procedure required grievances to be made in good faith, it was not a proper grievance. She said it was "*disingenuous*" and for those reasons said it was "*not dealt with at all*".

The disciplinary hearing

66. The disciplinary hearing took place at 15:30 on 16 June 2023. The reason for the disciplinary hearing is recorded as being "*Falsifying expense claims: Fraudulently claiming back expenses for a journey that he did not make.*

Failing to provide the truth during a subsequent investigation meeting." As far as we can tell the latter point had not been included as an allegation in any disciplinary invitation letter.

67. In the disciplinary hearing the claimant describes panicking when he realised the investigation meeting was not just about expenses but also covered the conflict of interest allegation. He continued his criticism of Mr Brown's behaviour during his sickness absence. Ms Saunt is recorded as saying "*I … acknowledge the concerns you've made and I will investigate those separately*".

68. When asked why the claimant had not admitted to his "error" earlier the claimant says "*Because I went to seek legal advice. I'll be honest I lost confidence, no one was listening to me.*" After a brief adjournment, Ms Saunt is recorded as telling the claimant he will be summarily dismissed.

The appeal

69. The claimant appealed against his dismissal and his appeal was heard by John Gavin. We will refer to the appeal so far as necessary in our discussion and conclusions.

THE LAW

Direct discrimination

70. Section 13(1) of the Equality Act 2010 describes direct discrimination:

> *"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."*

71. For his claims of discrimination the claimant has the benefit of the burden of proof provisions in s136 of the Equality Act 2010:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

72. However, the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37 at para 32 said:

> *"it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they*

have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Unfair dismissal

73. Section 98 of the Employment Rights Act 1996 addresses how a tribunal is to assess whether or not a dismissal is unfair:

> *"(1) In determining … whether the dismissal of an employee is fair or unfair it is for the employer to show:*
>
> *(a) the reason … for the dismissal, and*
>
> *(b) that is it … a reason falling within subsection (2) …*
>
> *(2) A reason falls within this subsection if it … relates to the conduct of the employee …*
>
> *…*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair …*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

74. In his closing submissions, Mr Patel reminds us of the familiar factors derived (in cases of dismissal for alleged misconduct) from BHS v Burchell [1980} ICR 303:

> *"a. Whether the respondent genuinely believed that the claimant was guilty of misconduct*
>
> *b. Whether it had reasonable grounds for that belief, and*
>
> *c. Whether the respondent carried out a reasonable investigation"*

75. As well as liability it was agreed that at this stage we would also address any question of a "Polkey" deduction from compensation for unfair dismissal, and contributory fault.

76. On the question of a "Polkey" deduction, we adopt the following helpful statement of the law from the Employment Tribunal Remedies Handbook 2024-25 (Bath Publishing):

> *"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?"*

77. As for a reduction of compensation for contributory fault, different rules apply to a reduction from the basic award and a reduction from a compensatory award. The requirements are set out at s122(2) and s123(6) of the Employment Rights Act 1996 respectively.

78. S122(2) provides that:

> *"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."*

79. And s123(6) is as follows:

> *"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."*

80. We note the caution expressed in the Remedies Handbook cited above:

> *"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 ET 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)."*

DISCUSSION AND CONCLUSIONS

Discrimination

81. We have no hesitation in dismissing the claimant's allegations of direct race and sex discrimination. The problem for the claimant is that there is nothing from which we could conclude that what occurred to him was because of or

contributed to in any way by his race or sex. His claim in this respect depends entirely on the comparators he alleges, but for those comparators alleged in respect of expenses reporting he accepted in closing submissions that we have no evidence of any specific incident in respect of which they had been treated any differently than him in respect of expenses.

82. His second claim depends on Rachael Alpha not also being investigated concerning the conflict of interest, but it is pointless for the respondent to investigate or attempt to investigate someone who was no longer employed. The claimant was not able to contradict Ms Wilson's evidence that she understood that Rachael Alpha was no longer with the business, and questions of calling Ms Alpha back to assist with litigation did not arise. They did not need Ms Alpha's evidence on the situation when they could ask the claimant about it.

83. The claims of unlawful discrimination are dismissed.

Unfair dismissal - liability

84. We asked the claimant to set out in his closing submissions the reasons why he says his dismissal was unfair. He has done so, and we will address the question of liability for unfair dismissal by reference to the claimant's submissions.

85. The first point is, of course, the reason for the dismissal. Despite the points made by the claimant in general under the heading "outcome" there has never really been any doubt that the reason for his dismissal was a reason related to his conduct, nor that, in Burchell terms, Ms Saunt had a genuine belief that he was guilty of misconduct. What requires further consideration is whether that belief was held on reasonable grounds after as much investigation as was reasonable. It is here that the elements of "process" are particularly significant.

Nor forewarned that initial OEC investigation would include a conflict of interest allegation

86. This is true. The claimant was never notified of this allegation prior to the first investigatory meeting. That is a cause for concern.

Removal of the link with conflict of interest

87. As the claimant points out it seems that some (perhaps particularly Mr Brown) saw a possible link between the alleged conflict of interest and the false expenses. But that was not substantiated. It is true that the notes were edited to remove reference to that. There is nothing obviously wrong with this and in many cases it would operate to an employee's advantage to have reference to an unsubstantiated allegation removed. The claimant's point is that "*I could not use it as a mitigating factor*". It isn't entirely clear what he means by this.

Our best interpretation of this is that the removal of this from the notes meant that he could not use the confusion or "panic" he refers to arising from this in his defence. But of course he did, both in the apology letter and the grievance. If there is a problem with this it is not with the editing of the notes but with the respondent's handling of the apology letter and/or grievance. This also addresses the claimant's point 3.2(d).

DB did not maintain his duty of care

88. The conduct of the respondent during the claimant's sickness absence is not a matter that is relevant to whether his dismissal was unfair or not.

The grievance letter

89. At 3.2(e)-(h) are various references to the grievance letter, including that it was "*not followed up on*" and not passed on to the appeal officer.

90. In Burchell terms this amounts to whether there was a reasonable investigation. The claimant was requesting that further matters were investigated, including that others had been treated differently when problems arose with their expenses.

91. It is clear that Ms Saunt was not well disposed to the claimant by the time of the disciplinary hearing. She was frustrated by what she saw as delaying tactics, and it also appears to be her view that the "apology" letter was nothing more than an admission by the claimant that he was guilty of gross misconduct.

92. As we shall come on to, the claimant's lies during the investigation period did him no credit, but we do not see there is any proper basis for Ms Saunt to say that because of the previous lies the grievance could not have been considered to be made in good faith, and should be, effectively, ignored.

93. We are not, as such, looking for a full-scale separate grievance investigation. It would have been appropriate to address much, possibly all, of the grievance in the context of the disciplinary investigation, but it was not appropriate to ignore it.

94. The tribunal is unanimously of the view that the failure to pay any attention to the claimant's allegation that others had been treated differently in respect of expenses allegations rendered the claimant's dismissal unfair. This should have been investigated and the failure to do so meant that there had not been as much investigation as was reasonable in the circumstances.

95. In any sections which follow that refer to a majority or minority view the majority is Ms Crosby and Mr Wright and the minority is EJ Anstis.

96. The majority (but not the minority) consider that the unfairness in this respect goes further, and draws in the respondent's response to the apology letter.

97. The majority note that the claimant was not provided with advance information about the conflict of interest allegation, and so would have been taken aback when it was raised for the first time in the investigation meeting. They note that the meeting started with Ms Wilson saying "*CW informs the interviewee that we will ask questions, some might feel uncomfortable*". The majority accept that the claimant had good reason to be wary of such questions, and that this was expressed in the "apology letter". The majority point out that the introduction to the notes of the first meeting immediately seem to raise the conflict of interest point. The majority consider that the apology letter should have been considered much more as a point of mitigation than as Ms Saunt seemed to see it – a confession. The majority are troubled that there seemed to be no consideration by Ms Saunt of these personal matters and how they may have affected the claimant's reaction and response to the investigation. The majority consider that the decision to dismiss the claimant was also unfair as it did not take proper account of the mitigation put forward by the claimant in the apology letter.

98. The minority does not consider this to be an additional matter of unfairness, noting that the claimant's lies in respect of his expenses claim started substantially before there was any question of getting into personal matters such as what was on his phone. The question of the claimant's personal mobile phone had only arisen because of the claimant's lie that he had called Ms Alpha at the time, and his subsequent attempt to cover up this lie by suggesting that any evidence in respect of such a call would have been on his personal rather than work phone. In those circumstances while the matters referred to in the apology letter may have been of some relevance to the points that followed any question of requiring his personal phone, they could not explain the substantial lies that the claimant told before then. There was nothing in the claimant's personal concerns that required him to lie about having driven to Sale.

99. While the claimant has suggested that these problems with the grievance and apology letter continued through to the appeal hearing the important point is that the appeal did not in any way cure or address the unfairness we have identified.

100. So, for different reasons, the members of the tribunal unanimously conclude that the claimant's dismissal was unfair.

Unfair dismissal – a Polkey deduction?

101. For the majority, if matters had been dealt with fairly, the grievance would have been fully considered either within the context of the disciplinary process or as a separate grievance, but in either event prior to a disciplinary decision being made.

102. The majority consider that in those circumstances the outcome is too uncertain for a proper Polkey deduction to be made. The claimant had raised

a number of points that required investigation but were not investigated. The majority decline to speculate on what the outcome of this may be. The majority have concerns about the additional question of the claimant's lies during the process but consider that this is fully and more appropriately dealt with when considering contributory fault.

103. In considering what would have happened if the respondent had acted fairly, the minority note that the cause of unfairness was the failure to investigate the points made by the claimant in his grievance letter, principally that others had not been treated in the same way.

104. The minority note that even by the time of this hearing the claimant had produced no evidence that others had been treated differently, and there is no reason to think that if this had been investigated at the time any such evidence would have been forthcoming. As such, if the respondent had acted fairly this would have involved simply a further week or so of investigation by Ms Saunt before she inevitably reached the same conclusion that the claimant should be summarily dismissed, and such a dismissal would have been fair.

Unfair dismissal - contributory fault?

105. Considering contributory fault requires a consideration first of whether the claimant did carry out the act of misconduct with which he was charged – that is, deliberate falsification of expenses.

106. There is a again a difference of opinion between the majority and minority.

107. For the majority, the claimant cannot be said to have deliberately falsified his expenses.

108. The majority accept the reasons given by the claimant for having lied during his initial investigation meeting, so do not see this as an indication that the claimant was trying to cover up deliberate falsification of his expenses.

109. The majority consider it common practice to, as the claimant says he did, prepare draft expenses submissions in advance of a journey. The majority note that the claimant had said at an early stage that he would be driving. The majority note the general difficulties that there seemed to be with the respondent's process for claiming expenses. The majority note that the claimant had little to gain by falsifying one small element of one expenses claim, and consider that on the balance of probabilities he is correct in saying that this was a mistake rather than deliberate falsification. Such a mistake is not blameworthy and would not mean that there was a deduction from the claimant's compensation.

110. But there is more to it than that. The majority note that the claimant had persistently and consistently lied during the investigation process. While there may have been reasons for that, those reasons did not compel or require the

claimant to lie. The claimant's lies undoubtedly contributed to his dismissal and they are at least partly blameworthy. The majority consider that the claimant's compensatory and basic award should be reduced by 75% to reflect this.

111. The minority have concluded on the balance of probabilities that the claimant did deliberately falsify his expenses. The minority take the view that the claimant's lies during the investigatory process were a clear attempt to cover up his falsification of expenses. If he had made a mistake there was no reason not to declare that right from the start, instead of coming up with increasingly complicated explanation each of which turned out to be lies. The minority considers that the reasons given by the claimant in his apology letter do not amount to an explanation of the lies or an excuse for them. The minority consider that on accepting that the claims were wrong the claimant has continued to give varied and unconvincing reasons as to how it was that this could be a mistake. He has given multiple explanations of this, and his closing submissions do not in any way address one of those explanations, which was that he had correctly completed the expenses form following his return to Sale. The minority consider that this requires a 100% deduction from the basic and compensatory award.

112. A separate order addresses arrangements for a remedy hearing.

Employment Judge Anstis
Date: 20 October 2024

REASONS SENT TO THE PARTIES ON

8 November 2024

FOR THE TRIBUNAL OFFICE