EMPLOYMENT TRIBUNALS

Claimant: Mr S Singh

Respondent: European Metal Recycling Ltd

Heard at: Birmingham Employment Tribunal (by CVP)

On: 04 and 05 August 2021, with a further day added on 17 August 2021 for the purpose of tribunal deliberations.

Before: Employment Judge Mark Butler
Mr S Woodall
Mrs K Davis

Representation
Claimant: Mr A MacMillan (Counsel)
Respondent: Mr J Latham (Solicitor)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing.

JUDGMENT

The claimant's claim for direct race discrimination is ill-founded and dismissed.

REASONS

Introduction

1. The claims in this case arise following the presentation of a claim form on 17 September 2019. The claimant brought a claim for direct race discrimination. The claim was considered by Employment Judge Self at Case Management Hearing on 20 February 2020, where it was recorded that the claim was brought in relation to one detriment, namely the claimant's dismissal.

2. We were assisted by a bundle that ran to 209 electronic pages. Helpfully the respondent's representative had included two sets of page numbers, one of which was reference to the electronic page number in the electronic bundle. It is this page reference we use throughout this judgment when referring documentary evidence. The tribunal found this particularly helpful. It makes it much easier to navigate an electronic bundle when the parties use page references that match he electronic page number.

3. For the respondent we heard evidence from Mr Thomas Bratby and Mr Paul Mayhew. Mr Bratby is employed as the Operations Manager for the respondent, and was the person who suspended the claimant following an incident on 24 May 2019, and was the dismissing officer. Mr Mayhew is the General Manager of the respondent, and he conducting the claimant's appeal against dismissal.

4. We heard evidence from the claimant only in relation to his claim. However, the tribunal was also presented with an unsigned and undated witness statement, that was produced on behalf of Mr Antonio Seixas. We were told by Mr MacMillan that Mr Seixas was not going to be attending the hearing. Although we considered the witness statement of Mr Seixas insofar as it was relevant, the tribunal only placed limited weight on the witness statement in these circumstances.

5. In terms of the evidence that we heard in this case we make no comment in relation to the credibility or reliability of the witnesses that appeared, save for the following. The tribunal found Mr Bratby, in particular, to be an impressive witness. He conceded matters where he considered it right to do so, and he gave clear, direct and detailed evidence on matters that he was questioned on. This did contrast with the evidence of the claimant, which on occasion, was somewhat vague. Although, we do not make too much of this in this judgment given the period of time that has passed since the events took place that led to the claimant's dismissal. However, this did lead the tribunal to preferring the evidence of Mr Bratby where there was a direct conflict of fact.

6. The hearing was disrupted at various points during the hearing, which had the potential to cause the case to go part-heard. However, the parties persevered despite this interruptions, and the evidence, and closing submissions, were completed within the two day allocation. The tribunal returned for the purposes of deliberation on 17 August 2021. This judgment arises from those deliberations.

7. There was some difficulty with the CVP system on day 2 of the hearing. This necessitated a change in the running order of the respondent's witnesses. And saw both of the respondent's witnesses having to dial into the hearing, rather than appearing via video link.

8. We thank both representatives in this case for the way that they presented their case on behalf of their clients. Both showed great patience with the proceedings, and showed the requisite level of respect to the witnesses to enable them to present their evidence, which is not always easy in remote hearings.

Issues

9. The issues to be determined in this case were set out by Employment Judge Self following a Case Management Hearing on 20 February 2020. The parties confirmed at the beginning of this hearing that this accurately recorded the issues to be determined. EJ Self recorded them as follows:

4. The issues in the case that the Tribunal will need to determine are as set out below:

Direct discrimination because of race

1.1. Was the Claimant treated less favourably (by being dismissed) than the named comparators (Steve Bayliss, Vince Allott, and Stuart Gair)?

1.2. Are those comparators' circumstances the same or materially the same as his (section 23, EqA 2010)?

1.3. Was that dismissal because of (including partly because of) his race?

2. **Remedies (if Claimant is successful)**

2.1. Has the Claimant suffered a loss following the discrimination?

2.2. If so, what award should be made in respect of loss?

2.3. Has the Claimant suffered any injury to feelings?

2.4. If so, what award should be made in respect of injury to feelings?

3. **Reductions (again, if Claimant is successful)**

Chagger Reduction

3.1. Is it just and equitable for the Tribunal to reduce the compensatory award to reflect the prospect of C being fairly dismissed in any event?

3.2. If so, what reduction should the Tribunal make?

Mitigation

3.3. Has C complied with the duty to mitigate his loss?

3.4. If not, what reduction should the Tribunal make to any award for loss of earnings made?

Closing Submissions

10. The tribunal was assisted by oral closing submissions made on behalf of both the claimant and the respondent. We do not repeat these submissions here, however, we note that closing submissions have been considered and taken into account when reaching this decision.

Law

Equality Act 2010: burden of proof

11. The burden of proof in relation to Equality Act claims is dealt with at s.136 of the Equality Act 2010. At s.136(2) it is provided that:

> 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.

12. Lord Justice Mummery (with which Laws and Maurice Kay LJJ agreed) in **Madarassy v Nomura International plc [2007] ICR 867**, at paragraphs 56-58, provided a summary of the principles that apply when considering the burden of proof in Equality Act Claims:

> "56. The court in *Igen v Wong…* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an

unlawful act of discrimination**. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**

57. "Could… conclude" in section 63A (2) must mean that **"a reasonable tribunal could properly conclude" from all the evidence before it.** This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; **for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment**.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim." (emphasis added)

13. Mummery LJ also explained further how evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (paras. 71-72):

"71. Section 63A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. **The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.**

72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal

could properly infer a prima facie case of discrimination on the proscribed ground…."

14. Lord Justice Mummery also pointed out that it will often be appropriate for the tribunal to go straight to the second stage. An example is where the employer is asserting that whether the burden at the first stage has been discharged or not, he has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by that approach since it is effectively assumed in his favour that the burden at the first stage has been discharged.

15. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant succeeds in doing this, then the onus will be on the respondent to prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment.

Equality Act: Direct Race Discrimination

16. Direct discrimination is provided for by section 13 of the Equality Act 2010. It is defined as occurring when:

> 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.

17. Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** gave guidance as to the approach an employment tribunal should consider when determining a direct discrimination complaint:

> "7. …In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.
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> 8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator

is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.

…

11. …employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

18. This is further explained by Mr Justice Underhill P (as he then was), in **Amnesty International v Ahmed [2009] IRLR 884:**

"32. The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of.[3] That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives: see, e.g., art. 2.2 (a) of Directive EU/2000/43 ("the Race Directive"). There is however no difference between that formulation and asking what was the "reason" that the act complained of was done, which is the language used in the victimisation provisions (e.g. s. 2 (1) of the 1976 Act): see *per* Lord Nicholls in **Nagarajan** at p. 512 D-E (also, to the same effect, Lord Steyn at p. 521 C-D).[4]

33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. **James v Eastleigh** is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the Council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The Council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p. 772 C-D), "gender based".[5] In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in **James v Eastleigh** decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which **Nagarajan** is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by

> the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in **James v Eastleigh**, a benign motive is irrelevant. This is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in **Nagarajan** (see para. 29 above). The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear.
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> …
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> 37. …although (as Lord Goff points out) the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else – all that matter is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Findings of Fact

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

19. The claimant was employed by the respondent from 16 April 2018 up until his dismissal on 30 May 2019. During this time he was employed as a Multi-Skilled Operator, which essentially required him to drive and operate a front loading shovel truck. These trucks were some 40 ton in weight.

20. The front-loading shovel trucks have a safety system employed. In essence, when these trucks are reversed, a radar system identifies objects or obstructions that are in its path. Where such an object/obstruction is identified then the sensors in the truck will start to beep. If the truck gets too close to an object then an automatic stopping system will activate, bringing the truck to a stop before a collision takes place.

21. The driver of the truck can turn off the auto-stop mechanism by pressing a button. Or, if the auto-stop mechanism has activated, the driver can override the system by depressing the accelerator. The claimant knows how to override this safety system, which he accepted under cross-examination. Although his evidence in tribunal was that he did not know how to turn the system off in its entirety, we prefer the evidence of Mr Bratby that this can be done by a simple switch similar to a car, and that the claimant more likely than not does know how to turn off the radar system.

22. At some point in the past few years, there was disgruntlement amongst a number of the truck drivers of the respondent. This was because of perceived favouritism in the allocation of overtime, with the person who allocated overtime appearing to favour Polish drivers with this allocation. This led to a number of complaints, with a number of the non-Polish drivers using the term 'Polish mafia'. Mr Bratby did not use this term. This term stopped being used once Mr Bratby introduced an allocation approach to overtime, to ensure fair distribution of overtime. We favoured Mr Bratby's evidence in relation to this matter. His evidence was clear and precise. Whilst the claimant's evidence on this was ambiguous and uncertain. There is a distinct lack of detail given by the claimant in relation to the use of such a phrase by Mr Darby and/or Mr Bratby. Further, the inconsistency of account of this matter between Mr Seixas and the claimant also supported this conclusion.

23. Mr Darby did not, nor did anybody else, described Asians as lacking work ethic in the workplace of the respondent. Similar to the finding above, it is the lack of any detail, and lack of any corroborating evidence that supported this finding. Further, despite intimating in his appeal difference in treatment, the claimant does not raise this as a concern, and neither is this presented as a pleading, despite such treatment, if it happened, likely to support a claim for race discrimination.

24. The claimant was subject to a number of policies, which were in place during his employment with the respondent. These include: the Health and Safety Policy at p.48; The Equal Opportunities Policy at p.50 and the Disciplinary Procedure at pp.53-56. As part of the Disciplinary Policy, the respondent expresses what it considers to be acts that would amount to Gross Misconduct (dismissal without notice), see p.55. This includes:

- Wilful damage or negligence resulting in serious loss, damage or injury or potential serious loss, damage or injury
- Breach of EMR equal opportunities policy
- Any actions which endangers their own or other person's safety at work
- Any serious breach of EMR and legislative health and safety regulations

25. The respondent utilises something called Toolbox Talks to update and train their staff. The claimant is familiar with these.

26. The claimant reversed into and hit a Lego brick on or around 20 December 2018. This was reported to Mr Goodyer (incident report form at p.89. Although the claimant's evidence was that he reported this incident to Mr Bratby, Mr Bratby's evidence is consistent with the contemporaneous document created at the time, namely that the matter was not reported to him but more likely to Mr Goodyer). It was recorded on the form that the cause of incident was:

Not paying attention

After speaking to Surbjit Singh he informed me that he hadn't noticed that he had hit the lego wall. He then went on to inform me that he didn't hear the reversing beeper and that the positioning of the sensor sometimes doesn't pick up the angles. The driver of the FLL today (21/12/18) was asked if he had had any problems with the sensor and he replied no.

27. The Lego brick incident was not taken any further by the respondent. It was not considered a serious health and safety issue, at least in terms of being subject to formal sanctions. However, it was still recorded as a minor issue, and that an incident had taken place. It was also considered sufficient to require the claimant to undertake a Toolbox Talk.

28. Following the Lego brick incident, the claimant was subjected to a Toolbox Talk, to cover the topic of Shovel Driver Refresher (see p.95). As part of this, it was explained to the claimant the following:

The primary control measure when reversing is for you as the driver to always look over your shoulder, the mirrors and cctv are there to assist in covering blind spots.

The radar sensor is there as a last resort measure, and must never be relied upon as a primary means of avoiding a reversing collision

It is inevitable that when ramping and to some extent pushing up driver operated over ride on the radar system must be undertraken. Once on the flat the radar should be re engaged by selecting neutral on the gear box.

29. At the beginning of the claimant's shift on 24 May 2019, the claimant undertook all the necessary safety checks of his vehicle. This included checking the radar system. The claimant found that all the sensors on override system at that point were working.

30. During the claimant's shift on 24 May 2019, at around 11am, the claimant was working in the IES Hall, and he loaded a lorry that had entered the Hall. The lorry driver drove the lorry out of the hall once it had been loaded, and parked up his truck outside of the hall. It is unclear how far away from the entrance to the Hall the driver had parked; however, it is likely to be a distance much greater than the 2m that the claimant suggests. The lorry appears to be parked around a lorry and trailer length away from the entrance to the IEL hall (see p.85, which is a still of the CCTV evidence just before the claimant's impact with the lorry).

31. Drivers would often park their trucks in this area outside of the Hall. This could be before reversing into the hall, or to sheet/strap up. When a driver sheets/straps up, he is required to leave his vehicle. We accepted Mr Bratby's evidence in relation to this.

32. The driver of the lorry had most likely parked up his vehicle to strap up having had his lorry filled. In reaching this finding we note that the claimant in the investigation meeting on the 24 May 2019, stated that '…[the lorry] should not have been parked there, he should have strapped up in the IES Hall or outside out of the way' (see p.57). This implies that strapping up of the vehicle was taking place outside when it should have been done inside the Hall. We also considered the oral evidence of Mr Bratby in relation to this matter, who explained that this is something that lorry drivers did regularly. And we have considered the CCTV still at p.85, where the vehicles sheet has not been fully strapped on to the vehicle. The mage shows a partially covered trailer, which suggests that the vehicle was in the process of being covered by the sheet.

33. The driver had left the cab of his vehicle after he had parked the lorry up outside of the Hall and was on the yard and in the vicinity of the lorry during the incident. This is inevitable given our finding above. However, further supporting this finding

is that Mr Browne explained to the claimant during the 24 May 2019 Investigation Meeting that the lorry driver had walked around the back of the lorry in the exact place he hit only a minute before, which the claimant did not deny, but merely answered by stating that he looked in is mirror for him (see p.57). In that same meeting stated that he had seen the lorry driver and knew he was there. That he was concentrating on him, before stating that 'the driver shouldn't have been there' (see p.58). In that same meeting (p.58) and in the claimant's witness statement (paragraph 15) the claimant describes the driver coming round to the back of the lorry following the incident; there is no suggestion by the claimant that the driver came out of is cab or from elsewhere. And furthermore, the claimant gave evidence that he believed that the driver was in the trailer of his lorry. It is implausible that the claimant reached this conclusion without having seen the driver leave his cab and walk round to the back of his trailer. This all leads us to the conclusion that he must have been on the ground floor and in the vicinity of the truck at the point of impact.

34. The claimant was not happy with where the driver had parked his lorry. He decided that he was going to reverse to the lorry and tell the driver off for having parked in a place that the claimant considered to be a non-parking zone.

35. Given that we have made a finding that the claimant's radar system was working throughout his shift, we make the finding that the claimant made the decision to override the auto-stop mechanism when it alerted him to the lorry that was in his path whilst he reversed. The claimant's response to being questioned about the incident on 24 May 2019 is quite telling in this respect, where he stated that he may have hit the override system inside the hall.

36. The claimant reversed his truck into the stationary lorry that was parked outside of the IES hall, with impact being on the rear of the lorry's trailer, a place where the driver had been in the vicinity of a minute before.

37. At no point following the incident did the claimant put in any report to suggest that the sensors were not working during his shift on 24 May 2019. Despite the claimant understanding that an issue with the sensors is considered serious (a category three issue) that would see any such vehicle decommissioned until the fault was fixed. The reason why the claimant did not put in any such report is because the claimant's radar system and the associated sensors continued to work throughout his shift on 24 May 2019.

38. At no point have there been any reports from any of the truck drivers, including the claimant, to the effect that the sensors on the trucks have stopped working as they have become covered with dust and/or debris.

39. The claimant, following the incident, did not then clean the radar sensors of dust and debris. We make this finding having considered that on the day of the incident, when questioned about it the claimant did not express that this was the action he took. The claimant when giving his account of the incident at the time (which is noted more fully below) at no point expressed that the sensors had failed, and that this was due to dust/debris, or that this had happened previously, and that he then had to clean the sensors. Nor did the claimant raise a report that dust and debris caused the sensors to stop working, and nor has anybody else. In light of all of this, this is a plausible conclusion for this tribunal to reach.

40. The claimant was interviewed by Mr Russell Browne in relation to this incident on the 24 May 2019, at 11.50am, closely following the incident in order to take a statement from him whilst events were still fresh in his mind. A copy of this interview is at pp.57-59. The claimant explained the following:

    a. That he thought that the lorry driver may have been in his trailer, and that

if he was, he would go and tell him off.

b. That he was watching out for the driver, but reversed too far back and touched the back of the truck
c. He states that his sensors were working
d. That he did not hear them as he was concentrating on the lorry at all times
e. When it was put to him that the driver had walked around the back of the lorry in the exact place the claimant hit one minute before the collision, the claimant did not deny it.
f. That he talked to the driver immediately following the incident
g. That he did see the driver, and knew he was there. That he was concentrating on him and does not know why he did not stop. That the driver should not have been there, and that he was concentrating on him more than anything else.
h. When the meeting reconvened at 12.20pm, the claimant explained that he may have hit the override system inside the hall.

41. The claimant had a further meeting on 24 May 2019, at 12.35pm, where Mr Bratby informed the claimant that having viewed the CCTV footage and having taken statements from Mr Browne and the claimant, that he was being suspended on full pay pending an investigation and disciplinary meeting.

42. The sensors on the claimant's vehicle were checked and tested by Mr Bratby, Mr Allott and Mr Browne at 1pm on 24 May 2019, and were found to be working. They undertook a test whereby the claimant's vehicle was reversed towards a parked lorry, during which the radar system brought the truck to a stop.

43. On 30 May 2019, at 3pm, the claimant attended an Employment Review Investigation meeting (notes at pp.63-68). In this meeting the claimant explained:

    a. That he had informed Mr Browne that he did not know whether the sensors were working
    b. That he doesn't think that he would have overridden the system, I wouldn't have needed to
    c. That as soon as the incident happened he took the truck out of IES and he cleaned the radar system because it was full of debris
    d. That the system would be working in the post-incident checks as he had cleaned the radar system by then
    e. That the debris was blocking the radar system
    f. That others had experienced this problem, although the claimant did not name who else had encountered this same problem.
    g. That he would not have gone out of that hall for two reasons. First, that he always parked up when there are people there and he does not move his truck. And secondly, he always looks around.
    h. When it was put to the claimant that in his initial statement that you must have turned off the radar sensor, he replied by saying he was not thinking straight on that day and that he was in shock.

44. Mr Bratby in the meeting of 30 May 2019 dismissed the claimant with immediate effect. The reason for the claimant's dismissal was the incident on 24 May 2019. Although in this meeting Mr Bratby does include the first incident with the Lego bricks when dismissing the claimant, the clear focus is on the second incident when deciding to terminate the claimant's contract. This is the clear focus of Mr Bratby on page 64, where he refers to the 24 May 2019 incident as a 'very serious incident', which is consistent with the evidence that Mr Bratby gave in tribunal.

45. This was viewed as a serious health and safety incident by the respondent. In making this finding we considered evidence including: that from Mr Browne who

explained to the claimant on the day of the incident that 'it could have been a fatality. I know it was a little mistake on your behalf but it could have been more serious'; that Mr Bratby when giving the claimant notice of suspension explained to the claimant that the incident was 'pretty serious'; in the employment review investigation meeting, Mr Bratby explained that 'this was a major health and safety concern and I don't think you understand the seriousness of the incident. If you had of hit the drive, you could have been in custody for manslaughter…' All of which is consistent with evidence of Mr Bratby and Mr Mayhew before the tribunal.

46. Mr Bratby genuinely believed that this was a conduct issue, he had reasonable grounds to believe this, and this was based on reasonable investigations.

47. On 31 May 2019 the claimant receives his letter of dismissal. This confirms that the claimant was dismissed following concerns over his general attitude towards health and safety, but more specifically following the incident on 24 May 2019. This reflected the reason that was in the mind of Mr Bratby when he reached the decision to dismiss the claimant.

48. The claimant mentions discrimination for the first time in his appeal letter of 03 June 2019 (p.70) again on 10 June 2019 (p.73), and a third time in his appeal notes (pp.75-76). However, he does not make an allegation of discrimination.

49. On 12 June 2019, the claimant attended an appeal meeting, for which Mr Mayhew was the investigating manager. The claimant raised a number of matters in his appeal. This included concerns about the evidence he had received, and lateness. That there were subsequent servicing of the trucks following faults identified. That there were 3 comparator cases where others were treated less harshly in similar circumstances and that he considered his treatment to be discrimination: namely Mr Vince Allott, Mr Steven Bayliss and Mr Stuart Gair. And that the radar system had subsequently been updated.

50. The claimant received an appeal outcome letter on 25 June 2019. The decision was to refuse the appeal and uphold the dismissal. Each of the points of appeal were addressed, albeit briefly. In relation to the allegation of discrimination, Mr Mayhew concluded that the cases of the three comparators were not the same as that of the claimant, and that each had been given sanctions appropriate to them.

51. The claimant does not understand the potential consequences of this incident. Nor is he remorseful. At no point during the investigation, the decision making process, the appeal or this hearing did the claimant seem to appreciate that his action had potential serious consequences. He constantly referred to the incident as a bump.

52. The radar system has underwent a software update following the dismissal of the claimant. However, this was not as a result of a fault with the system.

53. The incident involving Mr Allot is not a comparable situation to that of the claimant. This incident took place under different management. Involved a collision with a vehicle that had moved into the path of MR Allott's vehicle rather than being a stationary vehicle. And there was no potential risk to a pedestrian, the incident involving Mr Allott did not involve a situation where a pedestrian was in the vicinity of the impact site.

54. The incident involving Mr Gair was not comparable to the incident involving the claimant. MR Gair was not directly involved in the incidents for which he was investigated, but had indirect involvement in his capacity a supervisor. This is a material difference in the circumstances of Mr Gair when compared ot the

claimant.

55. The incident involving Mr Bayliss is not a comparable situation to that of the claimant either. Again, the incident involving Mr Bayliss did not involve potential risk of harm to a pedestrian. This is a significant difference between the two incidents.

56. The extent of the damage to the lorry trailer caused by the claimant was to the sum of £18,551, which can be seen on the invoice dated 08 October 2019 (see pp.98-99). This figure was unknown at the time of the decision to dismiss the claimant.

Conclusions

57. The comparators put forward by the claimant are not suitable comparators (as indicated above). There are material differences evident in each of the three persons put forward. Further, the claimant has failed to adduce sufficient evidence to support a finding that the environment in which he worked was one in which discriminatory language/treatment occurred, in order to support an inference of discriminatory treatment with respect his dismissal. The claimant's witness evidence was vague and ambiguous on this matter. And ultimately, the tribunal concluded that this was not the case. Save for some references to 'Polish Mafia' amongst the workforce in the past, this tribunal has concluded that there simply is not sufficient evidence to make any such findings from which an inference can be made. And in any event, found the evidence of Mr Bratby on this point clear, precise and plausible, especially given that no conflicting evidence was submitted to the tribunal of such an environment existing.

58. The claimant has failed to satisfy the tribunal with facts from which, in the absence of a non-discriminatory explanation, it could conclude that his dismissal was an act of discrimination. The claimant has established little more than a difference in status and a difference in treatment. This is simply not enough to satisfy the initial burden that rests on him.

59. However, even if we are wrong on that, the tribunal, given its findings above, was satisfied that the claimant was dismissed for a non-discriminatory reason. That he was dismissed due to the serious nature of the incident in which he was involved in on 24 May 2019. The claimant was dismissed for this conduct, which was deemed to be a serious breach of Health and Safety. So even if the claimant had satisfied the initial burden that rested on him in this claim, the respondent would have satisfied the burden that then rested on it in establishing a non-discriminatory explanation for the claimant's dismissal.

60. In these circumstances the claimant's claim for direct race discrimination is dismissed.

Employment Judge Mark Butler

Date__19 August 2021__

Notes

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

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