EMPLOYMENT TRIBUNALS

Claimant: **Mr D Rodrigues**

Respondent: **Disposables and Catering Supplies Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **14th January 2021 and (in chambers) 25 February 2021**

Before: **Employment Judge Reid**
Members: **Mr P Lowe**
Mr L O'Callaghan

Representation

Claimant: In person

Respondent: Mr Wilson, Counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was video (V) (fully remote) (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the Tribunal were the documents in the electronic bundle (to page 103) and the parties' witness statements.

JUDGMENT (Reserved)

1. The Claimant was not wrongfully dismissed by the Respondent and is therefore not entitled to any notice pay. This claim is dismissed.

2. The Respondent did not directly discriminate against the Claimant on the grounds of his race (nationality) contrary to s13 Equality Act 2010. This claim is dismissed.

3. The Respondent made an unlawful deduction from the Claimant's accrued holiday pay of £230.80, contrary to s13 Employment Rights Act. The Respondent is therefore to repay this sum to the Claimant.

REASONS

Background and claim

1. The Claimant was employed by the Respondent as a driver from 24th September 2018 to 25th June 2019 when he was dismissed without notice for not reporting damage to the Respondent's van, caused when he was driving it.

2. The Claimant presented his claim form on 3rd October 2019. The Claimant brought claims for race discrimination (based on nationality) and for his notice pay (of one week). He also made a claim about a deduction from his pay of £1,000, being the amount of the excess on the Respondent's vehicle policy. That deduction was made from two different payments due to the Claimant on termination. The first deduction was made from £769.20 which was the sum the Respondent had withheld from the wages paid to him at the start of the employment to cover this situation. The second deduction was from his accrued holiday of £269.15; the deduction was of £230.80 and he was paid the balance.

3. A preliminary hearing was held on 31st January 2021. At that hearing the Claimant withdrew his other claims for failure to provide him with a written statement of his employment terms and written reasons for dismissal and his claim for non-payment of his June 2019 wages. He also confirmed at this hearing that he did not now claim he was owed 7 days holiday pay and accepted that the Respondent was right to say it was 3.5 days (ie the £269.15).

4. At the preliminary hearing the following acts were identified as the acts of claimed direct race discrimination (based on nationality):

- Dismissing him for modest scratches on the van
- Failing to investigate the causes of those scratches but responding with immediate dismissal
- Requiring him to leave the premises immediately and threatening him with the police if he did not do so.

5. The Claimant referred to an actual comparator driver (who he said at the hearing he did not know the nationality of); the Claimant said he had been treated differently to that other driver who had previously caused damage to the van (before it became the Claimant's van) and who had not been dismissed; alternatively he referred to a hypothetical British worker as comparator. The Claimant confirmed at this hearing that he is a dual national; he is both a Brazilian national and an Italian national.

6. The Claimant attended the hearing to give evidence. He was not represented. His other witness Reverend Knight did not attend (the Claimant said he was not free due to other commitments) and the Tribunal explained that if Reverend Knight was not present to answer questions the Tribunal could give his evidence less weight (to the extent his evidence was in fact relevant to the matters in issue). The Respondent was represented and Mr Ball and Mr Finneral attended to give evidence; Mr Frostick provided a witness statement but did not attend and so equally could not answer questions about his witness statement so that less weight could be given to it. Each party had provided witness statements

and there was an electronic bundle to page 103 (to which page 63A was added during the hearing).

7. The hearing had been listed for two days but was reduced to one day due to Tribunal resources. The evidence was completed and the Tribunal heard oral submissions on both sides. It reserved its decision. The gap between the hearing and the issue of this judgment is occasioned by the Tribunal being unable to meet to discuss the case until 25th February 2021.

<u>Findings of fact</u>

<u>The Claimant's contractual obligations to the Respondent</u>

8. The Claimant was provided with a van by the Respondent. The Respondent's practice was to allocate a particular van to a driver, which they would then usually drive. In the Claimant's case this was van W90DCS. When he was allocated this van it had already had some previous damage caused by its previous driver (pages 83-90). This was not the damage for which he was dismissed.

9. The Claimant's contract of employment said that if there was damage to a vehicle due to neglect the Respondent could take disciplinary action including possible dismissal and that the Claimant was obliged to carry out a daily inspection and complete a defect report (page 37). The Claimant also agreed to comply with the Respondent's vehicle policy (page 37) and that 10 days salary could be withheld for various contingencies including damage to company vehicles (page 34, clause 5.4.) The contract also said that an example of gross misconduct justifying dismissal without notice was serious damage to the Respondent's property or serious breach of its rules or a failure to observe Company procedures (page 42). In a clause headed 'Deductions from wages', the contract said that a deduction from the Claimant's salary could be made for the insurance excess for a blameworthy accident to a company vehicle (page 40, clause 20). Elsewhere in the contract (page 37 clause 10) the contract provided for deductions in other circumstances from 'final payments' due to the employee. There was no definition of salary, wages or final payments in the contract and no express reference to accrued holiday pay save to provide that it was payable (page 36, clause 8.3).

10. Under the Respondent's vehicle policy the Claimant was required to report accidents immediately (page 49). He was also required to pay the policy excess of £1,000 (in installments over 4 months) if damage was caused for which he was responsible (page 50) (unless the damage was less than £1,000) and if he left during such a payment period it was all deductible from the 'final wages' (page 51). The Tribunal finds that the term 'final wages payment' in the policy included the withheld wages of £769.20 because it was wages (albeit withheld from earlier in the employment) which would ordinarily be payable at the end of the employment if there had been no damage to a van.

11. The Claimant was paid his wages up to the termination date as normal and the deductions for the insurance excess were made from the withheld wages and from his accrued holiday pay.

The damage to the van on 21st June 2019

12. The Claimant accepted in cross-examination that the van was damaged when he was driving it in London on Friday 21st June 2019 (photos page 76-80) (contrary to his appeal page 60 where he said he definitely didn't do it). He also eventually accepted in cross-examination that he had felt a jolt or shudder to the van, alerting him to having hit the bollard at the side of the road and that this shudder was evident on the dashcam footage. His case by the time of the hearing was that on return to the depot he had not however seen the actual damage and that is why he failed to report it. He accepted in cross examination when shown pages 64-73 that the van was not driven between the Friday when he returned it to the depot and the following Tuesday (25th June) when he was shown the damage by Mr Ball. The Claimant had a day off on Monday 24th June. By the time of the hearing the Claimant did not therefore continue to argue that the damage could have been caused by another driver between Friday and Tuesday when he was shown the damage by Mr Ball. The Tribunal therefore finds that the Claimant caused the damage to the van on Friday 21st June and that the damage present on Tuesday 25th June (when the Claimant and Mr Ball inspected it) was that damage.

13. The Claimant's case as put at the hearing was that whilst he had felt the jolt/shudder to the van he had not seen the damage to the van when he returned to the depot at the end of his shift around midday. He said he washed the van but did not see any damage and therefore did not report any when he completed the vehicle defect form (page 75). The Tribunal finds that he did see the damage because firstly it is clearly evident (see photos) and the Claimant on his own account was aware he had hit something so would have been more aware to look than usual. Secondly he washed the van so would have gone all the way round it. Thirdly it was the middle of the day in summer so the Claimant's washing and inspection of the van was not hampered by a lack of light. By the time of the hearing the Claimant's case was that he did not check the van on his return but he had said in his appeal (page 59) and in his claim form and witness statement that he had checked it.

14. The Claimant's oral evidence was that he was already looking for a new job since around two weeks previously to find something closer to home. He had also pre-booked Monday 24th June as a day's holiday to attend an interview though his oral evidence initially was that that employer had already offered him the new job even before interviewing him but then said it was only offered at the interview. His oral evidence was that he had been planning to give the Respondent a week's notice that he was resigning. The Tribunal finds that the Claimant had already decided to leave and that his motive when resigning was not to avoid being dismissed.

15. The Claimant failed to report the damage on the vehicle report form (page 75) and the damage was found by Mr Ball who went to inspect the vehicle shortly after the Claimant had departed for the day. Mr Ball added the note underneath the Claimant's signature recording that damage. Mr Ball decided to give the Claimant the opportunity to come forward and report the damage on the next day he was at work.

16. The Claimant returned to work after his day off and was allocated a different van on Tuesday 25th June. He had not reported the damage on the Friday and continued not to report the damage on Tuesday when he returned and worked as normal till the end of his shift.

17. When the Claimant returned to the depot at the end of his shift on Tuesday 25th June Mr Ball asked to speak to him. By this stage Mr Ball had downloaded and viewed the dashcam footage of the incident. The Claimant was writing a resignation letter in his van and Mr Ball gave him a few minutes to finish what he was doing and then asked again to speak to the Claimant. When he asked the Claimant what he was writing the Claimant said it was a resignation letter and Mr Ball told him that he wouldn't be accepting any resignation because the van was damaged and the Claimant had not reported it which amounted to an act of gross misconduct. They both went to the van to inspect the damage and then they went into the office and Mr Ball showed him the dashcam footage. At this stage the Claimant said it must have been another driver though he accepted at this hearing that the documents showed that the van had not been used by anyone else since the Friday. Mr Ball told the Claimant he was being dismissed for gross misconduct for damaging the van and then not reporting the damage. Mr Ball had investigated what had happened by looking at the dashcam footage and by taking the Claimant to the van to show him the damage to see what the Claimant had to say about it.

18. The Tribunal finds that the Claimant was by now raising his voice; he accepted in his oral evidence that he had been upset and that he had been shouting and saying it was unfair. In turn Mr Ball had to raise his voice to make himself heard. The Claimant asked Mr Ball to speak to Reverend Knight, the Claimant's pastor, which Mr Ball reasonably refused to do. The commotion was such that Mr Frostick (Chief Operations Manager) heard it and told Mr Ball to call the police because the Claimant was refusing to leave and still shouting; although Mr Frostick did not attend the hearing his evidence was consistent with Mr Ball's account and consistent with the Claimant accepting that he had been shouting. The police were called but the Claimant then left so that call was cancelled. Although Reverend Knight said it was Mr Ball who was shouting and not the Claimant who stayed calm (witness statement para 17-18), he did not hear the whole conversation and the Claimant accepted at the hearing that he had not remained calm and had shouted that it was unfair. Given the situation needed to be resolved and the Claimant would not leave, the pragmatic solution was to call the police, though in the end they were not needed as the Claimant left. This was embarrassing for the Claimant because the commotion was heard by other staff nearby but the Tribunal finds that the Claimant was not publicly dismissed in front of his colleagues though they heard the subsequent commotion.

19. At the hearing the Claimant explained that part of his reaction had been due to misunderstanding what Mr Ball was saying due to English not being the Claimant's first language. When he was taken to see the damage to the van and Mr Ball asked if he had had an accident the Claimant thought Mr Ball meant a crash. However he was then shown the specific damage from which he would have understood he was not being accused of crashing the vehicle but of damaging it. The Claimant also said that he had not been sure when told he was dismissed what that term meant. However the Claimant did understand it when

Mr Ball used the term 'sacked'. The Tribunal finds therefore that the Claimant did understand what he was being accused of and what was happening as a result.

20. The Claimant's dismissal was confirmed by letter (page 56 wrongly dated September when it should say June). He appealed (page 59) saying that the evidence against him was inconclusive and that he was being wrongly accused of something he did not do. Mr Frostick responded (page 61).

21. The Tribunal finds that the damage to the van was not 'modest' as claimed. The repair estimate (page 74) was for £1,485.00.

22. Taking into account the above findings of fact the Claimant's failure to report the damage was gross misconduct meaning that the Respondent was entitled to dismiss him without notice.

<u>The Respondent's treatment of other employees/workers who cause damage to vehicles</u>

23. At this hearing the Claimant identified the comparator he referred to in his claim form as another driver who had previously used his vehicle in April 2019 which was damaged (page 73 first entry), and who the Claimant said was not dismissed or disciplined for the damage. The Claimant did not know this driver's nationality or whether that other driver had reported the damage. Mr Ball clarified that the person the Claimant was referring to was an agency driver supplied by the A1 agency. Based on Mr Ball's oral evidence the Tribunal finds that the agency driver caused damage to the vehicle and because of that Mr Ball told the agency that the Respondent would not accept that driver for any further work. He therefore treated the other driver in a broadly similar way to the Claimant because although the Respondent could not terminate his employment (the agency driver not being their employee) the Respondent no longer allowed the agency to send that driver. If the A1 driver had not reported it he was dealt with using the maximum penalty the Respondent could in practice use ie refuse to have that driver back. If he had reported it he was treated at least broadly speaking in a similar way to the way the Claimant said he was, and the Claimant did not report it.

24. The Tribunal finds that British drivers also employed by the Respondent had deductions from their wages made for damage to their vehicles (page 63). These were drivers who had reported the damage to the Respondent and so were not comparators in substantially the same circumstances as the Claimant because the Claimant had not reported the damage which was highly relevant to why he was dismissed.

<u>Relevant law</u>

<u>Wrongful dismissal (notice pay)</u>

25. The relevant law is the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 which provides that a breach of contract claim can be brought if it arises or is outstanding on the termination of employment. The amount which can be claimed is capped at £25,000.

26. There is a right to terminate the employment without notice where an employee commits an act amounting to a repudiatory breach of contract or gross misconduct.

27. In terms of the breach, the focus is on the damage to the employment relationship; acts of dishonesty or other acts poisoning the relationship fell within that but it could also include acts of gross negligence (*Adesokan v Sainsbury's [2017] EWCA Civ 22*).

Deduction from wages

28. s13 Employment Rights Act 1996 provides that an employer should not make a deduction from the employee's wages. The relevant exception in this claim was s13(1)(a) or (b), that the deduction was said to be authorised under the Claimant's contract or agreed to in writing.

29. If there is any ambiguity in the way the contract is drafted it is construed against the employer.

Equality Act 2010

Direct discrimination

s13 Equality Act 2010 (direct discrimination)

30. 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.

31. This provision requires a Tribunal to decide the following:-

a. Has there been treatment?

b. Is that treatment less favourable than the treatment which was or would have been given to a real or hypothetical comparator?

c. Was that difference in treatment because of a protected characteristic?

32. The Claimant's claims that he was subjected to direct discrimination because of his race. Race is a protected characteristic under s9 Equality Act 2010. The racial grounds the Claimant relied on are his nationality as a non-British national.

33. It is unlawful for employers to discriminate against employees, harass or victimise them under s39 and s40 Equality Act 2010. Where a comparator is necessary, he or she must be the same in all material respects, apart from the protected characteristic, as the claimant (s23 Equality Act 2010).

34. The determination of whether treatment is because of or related to a protected characteristic requires a Tribunal to consider the conscious or sub-conscious motivation of the alleged discriminator. This element will be established if the Tribunal finds that a protected characteristic formed a part of the reason for the treatment even though it may not have been the only or the

most significant reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877). In cases where the less favourable treatment complained of is not inherently related to a protected characteristic it is necessary for the Tribunal to look in to the mental processes of the alleged discriminator in order to determine the reason for the conduct (*Amnesty International v Ahmed* [2009] IRLR 884). If the Tribunal finds that treatment was because of a protected characteristic (whether consciously or subconsciously) it amounts to direct discrimination and cannot be indirect discrimination.

35. The issue of whether treatment amounts to 'less favourable treatment' is a question for the Tribunal to decide. The fact that a complainant honestly considers that he is being less favourably treated does not of itself establish that there is less favourable treatment (*Burrett v West Birmingham Health Authority* [1994] IRLR 7).

The burden of proof under the Equality Act 2010

36. s136 of the Equality Act 2010 provides as follows:

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (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.

37. This provision requires a claimant to prove facts consistent with his/her claims: if the claimant does this then the burden of proof shifts to the respondent to prove that it did not, in fact, commit the unlawful act in question (*Igen v Wong* [2005] IRLR 258). The respondent's explanation at this stage must be supported by cogent evidence showing that the claimant's treatment was in no sense whatsoever because of race or a protected act (*Fecitt v NHS Manchester* [2012] ICR 372).

38. The Tribunal has borne this two stage test in mind when deciding the Claimant's claims. It has also borne the principles set out in the Annex to the judgment in *Igen v Wong* in mind.

The drawing of inferences in discrimination claims

39. An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. The Tribunal has borne in mind that discrimination may be unconscious and people rarely admit even to themselves that, for example, considerations of race have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if a protected characteristic played a part (*Anya v University of Oxford* [2001] IRLR 377). The Tribunal has considered the guidance given by Elias J on this in the case of *Law Society v* Bahl [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR

799), in particular that unreasonable behaviour is not of itself evidence of discrimination or harassment though a tribunal may infer discrimination from unexplained unreasonable behaviour (see *Madarassy v Nomura International plc* [2007] IRLR 246).

Reasons

Wrongful dismissal (notice pay claim)

40. Taking into account the above findings of fact the Respondent was entitled to dismiss the Claimant without notice, for an act of gross misconduct namely the failure to report damage to the van which happened when he was driving it. The Claimant had not complied with the reporting of accidents obligation in the vehicle policy and under the contract gross misconduct included serious damage to property, breach of rules and a failure to follow company procedures.

Direct race discrimination

41. Taking into account the above findings of fact the Tribunal finds that there are no facts from which it could decide, in the absence of any other explanation, that the Respondent breached the Equality Act 2010.

42. The Tribunal finds that there was no actual comparator of a different nationality in substantially the same circumstances as the Claimant who was treated more favourably than the Claimant because he has not identified an actual person of a different nationality who did not report damage but who was not then dismissed. He has also not identified a comparator of a different nationality whose dismissal was handled in a different way to his own in similar circumstances.

43. Turning to the issue of a hypothetical comparator, taking into account the above findings of fact as to how other employees/agency workers were treated generally as regards damage to their vehicles for which they were held responsible, the Tribunal finds that a hypothetical comparator who was British would also have been dismissed if they had failed to report a similar level of damage to a vehicle, taking into account the contractual provisions covering such an eventuality which were in all employees contracts and, in terms of deductions for a reported incident, were applied to others. The Tribunal finds that if another employee was upset and shouting and refusing to leave when they had been dismissed, in circumstances when they had denied damaging Company property and blamed someone else despite being shown clear evidence to the contrary, the Respondent would equally have called the police in that situation too.

44. The Claimant was therefore not treated less favourably on the grounds of his nationality when he was dismissed or when he was required to leave the premises and told the police would be called. The Tribunal has found that there was in fact no failure to investigate, the other act complained of.

Deduction from wages (from holiday pay)

45. The authorisation in the contract and vehicle policy relied on by the Respondent allowed a deduction from wages (which included the withheld wages from the start of the employment) or salary. They did not expressly provide for a deduction from accrued holiday pay on termination.

46. Wages or salary is money paid for work done. Accrued holiday pay on termination is a payment for not having taken paid holiday.

47. Although s27(1)(a) Employment Rights Act 1996 defines' wages' as including holiday pay, that definition is not automatically imported into the authorisation clause, which has to be considered on its own terms as to what the clause allows the employer to do and when.

48. Further and even if that were not the case, s22 Employment Rights Act 1996 defines 'final installment of wages' as only covering wages payable for the last period of employment or a payment in lieu of notice. It makes no reference to other types of payment potentially payable when the employment terminates, consistent with a payment for accrued holiday pay not being considered as wages (or salary).

49. The authorisation has to cover two things: firstly the situation in which a deduction can be made and secondly where that deduction can be made from. Any ambiguity is construed against the employer.

50. In the Claimant's case the two relevant clauses did not specify that the deduction could be made from his accrued holiday pay on termination. The deduction (after using up the withheld wages) could have been made from the Claimant's June 2019 final wages but it was not.

51. The Tribunal therefore concludes that the Respondent did not have the authority to deduct the balance of the insurance excess of £230.80 from the Claimant's accrued holiday pay when his employment was terminated. That is not to say that the Claimant did not owe the Respondent for the balance of the insurance excess but the Respondent could not recoup from the Claimant's accrued holiday pay payment on termination.

Employment Judge Reid
Date 1st March 2021