EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102385/2020

Held in Glasgow on 27, 28 and 29 September 2022

Employment Judge Campbell
Members Ms Hutchison and Mr McPherson

Mr Muhammad Wasi	**Claimant** **In Person**
Glasgow City Council	**Respondent** **Represented by:** **Ms K Graydon - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that the claimant's dismissal was not an act of direct discrimination by reason of race, and his claim is therefore dismissed.

REASONS

General

1. This claim arises out of the claimant's employment by the respondent which began on 17 September 2018 and ended on 12 December 2019 with his dismissal. The claimant was employed as a Technical Food Safety Officer within the Neighbourhoods and Sustainability department of the respondent, which is the local authority for the city of Glasgow.

2. The claimant alleges that his dismissal was unfair and an act of direct discrimination by reason of his race. The respondent contends that the dismissal was non-discriminatory and justified on grounds of the claimant's conduct, specifically negligence in the performance of his role.

3. The parties had helpfully prepared a joint bundle of documents for reference at the hearing. Numbers in square brackets below are references to the page numbers of the bundle. The bundle contained a schedule of losses claimed.

4. Evidence was heard from the claimant, and also the following:

   a. Ms Margaret Arnott for the claimant, who is a former employee of the respondent and worked in a similar role to the claimant's;

   b. Ms Abida Shaheen for the claimant, who is his sister;

   c. Mr Neil Coltart for the respondent, who took the decision to dismiss the claimant;

   d. Ms Karen Broadley for the respondent, who is an HR officer and attended the disciplinary and appeal hearings; and

   e. Ms Jackie McCormack for the respondent, who is an HR officer and attended the claimant's appeal hearing.

5. Written witness statements had been prepared for each witness, and the claimant, and their contents were taken as the evidence in chief of the person concerned.

6. The witnesses (including the claimant) were found generally to be credible and reliable. There is conflict between the evidence of the claimant and that of some of the respondent's witnesses on some points and that is dealt with specifically below in the findings of fact.

7. At the conclusion of evidence the parties provided submissions which were considered along with the evidence when the tribunal deliberated and reached its decision.

Applicable law

8. Under the Equality Act 2010 (the 'Act') an employee is entitled not to be discriminated against by their employers in a number of ways. Discrimination must relate in some way to a recognised protected characteristic to be unlawful. Race is a protected characteristic.

9. An employer must not directly discriminate against an employee by reason of race, as set out in section 13 of the Act. An employer will discriminate if, by reason of race, they treat the employee less favourably than others. In that context, 'others' means someone else in comparable circumstances but for the differentiating factor of race. 'Others' may be a real person or people – i.e. real comparator(s) - or it may be a hypothetical comparator who it is believed the employer would treat more favourably if the situation arose.

10. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

11. An employee must normally have completed at least two whole years of continuous service to gain the right to make a claim of unfair dismissal. However, if they have been dismissed for a reason deemed to be automatically unfair the service requirement does not apply. Dismissal of an employee by reason of race is automatically unfair.

Legal issues

12. The claim had gone through a lengthy procedural history and had varied in scope and nature by the time of this hearing,

13. The legal question for the tribunal to determine were as follows:

    1. Was the claimant's dismissal on 12 December 2019 an act of direct race discrimination under section 13 of the Equality Act 2010 (the 'Act'), namely:

a. Was he treated less favourably than a suitable comparator was treated, or would have been treated; and

b. If so, was that by reason of race?

14. The claimant identified himself in this context as being of Pakistani ethnicity. His comparator was a Mr Tonner, a white employee of Scottish or British ethnicity employed by the respondent in a role similar to his and who was not dismissed. Further details in relation to Mr Tonner, the circumstances drawn upon by the claimant for comparison, and the respondent's treatment of Mr Tonner are dealt with below in the tribunal's findings of fact.

15. The less favourable treatment alleged by the claimant was his dismissal.

Findings in fact

16. The tribunal made the following findings of fact based on the evidence before it and on the balance of probability. The findings are relevant to the above legal issues to be determined and do not necessarily deal with every single evidential point or matter raised in the hearing.

Introduction

17. The claimant was employed by the respondent between 17 September 2018 and 19 April 2021. He was dismissed on the latter date. The respondent followed a disciplinary procedure culminating in his dismissal.

18. The respondent employed the claimant as a Technical Food Safety Officer. His role was effectively to visit premises within the respondent's local authority area which prepared and served food, and carry out inspections with a view to verifying whether they met food safety standards.

Events in July 2019

19. The claimant visited the premises of a restaurant on 8 July 2019 and carried out a typical inspection. He identified 11 issues with the proprietors' practices and informed staff working there of those matters. They were not serious issues but needed to be rectified or an enforcement notice, and ultimately a

fine, could be imposed for repeated breaches. The respondent has no power itself to impose fines, but can refer matters to the police for potential prosecution.

20. The claimant recorded the observations on a standard form which the respondent uses [213-218]. He left a copy with the manager of the restaurant and retained a further copy for the respondent's own records. He left the restaurant and finished his duties for the day.

21. Around 6pm in the evening of the following day, 9 July 2019, the claimant received a call on his mobile telephone from the manager at the restaurant he had inspected the day before. She had made at least two earlier attempts that day to call him. She said she was unhappy with the issues listed by the claimant in his report and asked what would happen if further infringements were noted in the future. The claimant explained that ultimately an improvement notice could be issued, and then a fine typically in the region of £300 to £1,000 from his experience. She wanted to go over the report with the claimant.

22. Around 8.30pm the same evening the manager called the claimant again. By this point she was calling him on his personal mobile number which he had given her as his work mobile battery was running low. She wanted to discuss the report further. The claimant was in the west end of Glasgow at the time and she said she was not far away. They agreed to meet adjacent to Great Western Road on Barrington Drive. Three people arrived in a car – the manager whom the claimant had spoken to, a man who was the business owner and another man whom the claimant also understood to be connected to the restaurant.

23. The claimant got into the car with the three individuals but felt uneasy about the situation. He got out of the car to fetch his copy of the inspection report from his own car. The three individuals followed him. He got into his own car and the business owner sat beside him on the rear seat. While they were looking at the report the business owner punched the claimant and took the report, which he handed to the other man outside the car. The business owner

racially insulted the claimant. The claimant got out of the car and the business owner followed him. He then punched the claimant again. The claimant understood that the man had misunderstood his comments about possible fines for further breaches and interpreted them as a request for a bribe in exchange for amending the report. The claimant ran away along Great Western Road. He was chased by the business owner for a short way before going into the Doublet Bar and waiting for around 15 minutes to calm down. None of the individuals from the restaurant came in after him and he went to retrieve his car, and drove home.

24. The claimant did not report these events to the police or his employer. He asserted in evidence that he had informed the respondent, namely his then line manager Mr Paul Birkin. His evidence was that he told Mr Birkin about the events around 10 or 11 July 2019, but Mr Birkin was due to leave the respondent's employment shortly after and appeared not to have done anything with the information. Despite this being the claimant's evidence, we do not accept that he reported the incident to Mr Birkin. He did not raise it in any of the investigatory interviews which followed. He said instead when asked why he had not told his employer that he had a lot going on in his personal life. Mr Birkin provided a testimonial letter to the claimant in relation to his appeal, referred to below, but it noticeably said nothing about the claimant reporting the events of 9 July 2019 to him. The question of whether the claimant had reported the matter to his employer around this time was central to the reasons for his dismissal, as discussed below.

25. The claimant was visited at home by officers from Police Scotland on 25 July 2019. They notified him that a complaint had been made against him by staff at the restaurant he had inspected on 8 July 2019. They had alleged that the claimant had assaulted and racially abused them, and attempted to extort money from them. This was a reference to the events of the evening of 9 July 2019.

26. The claimant was not charged at that time. The officers advised him to tell his employer about the complaints. The claimant did not take a note of the

officers' names or the station where they were based. It was not made clear to him what potential crime or crimes he may have committed.

27. The next day the claimant notified Ms Jane Dyer of the police visit. Ms Dyer was an Assistant Manager (Business Regulation) with the respondent and a manager within his department who was senior to him.

Suspension and investigation

28. The claimant was suspended from his duties on 26 July 2019 under the respondent's disciplinary policy and procedures. A letter confirming the suspension and asking him to attend an investigatory meeting was sent to him on 26 July 2019 [145]. The meeting was scheduled for 1 August 2019.

29. The reason for suspending the claimant was given in the letter as being because he had been interviewed by Police Scotland the day before in relation to allegations of assault, racism and extortion. It was considered that his status as an employee was potentially affected by that action.

30. The claimant was given the right to be accompanied at the investigation meeting and the letter confirmed he would be paid as normal during his suspension.

31. The claimant attended the investigatory meeting, which was chaired by Ms Dyer. A person from the respondent's HR department also attended to take notes. The claimant did not know any details of any potential investigation other than that the complaints had been made against him and were being followed up.

32. The claimant was invited by letter to a follow-up investigatory meeting to take place on 7 August 2019. Again it was chaired by Ms Dyer, and the claimant attended. By then the claimant had visited Giffnock police station and was told nothing formal was pending, although the investigation was still open. The claimant requested information about possible charges from Police Scotland by way of a data subject access request on 5 August 2019. The investigation was adjourned to wait for a response.

33. The claimant was asked to attend further investigation meetings on 22 and 27 August with Ms Dyer. Again he attended those. At the meeting on 22 August he confirmed that he had not heard further from Police Scotland. He was asked about two emails in his work email account which the respondent's Internal Audit department had found [241-242, 243-244].

34. The first email had been sent from the claimant's personal account to his work account on 25 July 2019, but had first been sent from his personal account to the same account on 10 July 2019, and therefore was originally drafted on that earlier date. It contained an account of the events of the evening of 9 July 2019 which the claimant had drafted.

35. The second email was one sent from the claimant's personal email account to his work account on 25 July 2019 at 21:08, therefore shortly after the police visited his home. This contained a differently worded account by the claimant of the same events.

36. The claimant acknowledged to Ms Dyer that it was a mistake to give the restaurant manager his personal mobile number as he had done, and disclose his location out of working hours. He said he had been naïve and not thinking straight. He indicated that some of the details in the first email were not correct, namely that he had not been kicked, but had been punched twice and he had initially walked away from the situation before breaking into a run.

37. Also at that meeting, the claimant mentioned that he had been involved in a road accident on 15 August 2019 – a week before - and would be attending hospital for physiotherapy in relation to neck and back injuries. He was asked whether it was linked to the investigation, and said that it wasn't, but that he would need to attend the appointments he was given. Although he did not mention at this time, he was prescribed antidepressant medication by his GP at the same time.

38. At the meeting on 27 August 2019 the claimant answered further questions about his two emails. He still had not received a response to his data subject access request. Ms Dyer asked him to submit a second subject access request using a format adopted by the respondent. This made clear that the

request was being made by the claimant to assist his employer, and sought details of any charges, the current status of any investigation, the names of the officers who had visited him and the station where they were based. The clamant signed and submitted this to Police Scotland as he had been asked.

39. The claimant received a response to his subject access request(s) on or around 17 September 2022. He emailed the document he had received to the respondent on 24 September [254-256]. The report simply indicated that the matter was still pending a decision on prosecution. The claimant's solicitor told him that the police had not reported the matter to the Procurator Fiscal as at 16 September 2019.

40. The claimant attended further investigatory meetings on 9 October, 6 November and 15 November 2019 with Ms Dyer.

41. At the meeting on 9 October he confirmed that he had been told the three possible charges against him were attempted extortion, assault and 'breach of duty' – likely to have meant breach of the peace. On 6 November the claimant was still waiting to hear if a prosecution would be brought against him. Ms Dyer said that up to that point the respondent's investigation had been paused to allow for the nature of any potential criminal proceedings to be made clear and, if relevant, pursued. The investigation would now focus on the claimant's actions on 9 July 2019 and he should expect to be asked questions about it at the next meeting.

42. When the claimant attended the meeting on 15 November 2019 he answered questions about the evening of 9 July. He clarified what training he had received in reporting incidents of this nature. He said that his training had taught him to report any incidents to his employer. He confirmed that his normal practice when starting and ending a shift was to notify a senior colleague by text message. He was asked if he understood the implications of only reporting the incident two weeks later and he said he did.

43. On 20 November 2019 the claimant's trade union representative Tricia McLeish emailed Ms Dyer to say that the claimant had been assigned a pleading diet on 5 December 2019 in relation to the three charges. His solicitor

said in a letter that a trial was expected to take place in approximately November 2020.

44. Some time in late November 2019 the investigation was concluded and Ms Dyer prepared a report [201-208]. It contains summaries of what was covered at the various investigation meetings the claimant attended. In the section headed 'Conclusion' she acknowledged that she had no information from individuals connected to the restaurant in question or Police Scotland and so had confined her focus to things the claimant had admitted to doing on 9 July 2019.

45. Ms Dyer concluded that:

    a. The claimant should not have met with a client outside of working hours, which was a breach of the Health and Safety requirements of a Technical Officer. The claimant would normally send a text message to a colleague after he had completed a site visit and was unable to do so on this occasion;

    b. The clamant did not contact police on 9 July 2019 despite being assaulted and subjected to threatening and racist language. This created unnecessary additional risk, particularly for colleagues who may have been asked to contact the same establishment;

    c. The claimant separately did not inform his employer about the incident, which he should have done for similar reasons and as he had been trained to do;

    d. The claimant's account of events given directly to Ms Dyer in the investigation meetings was inconsistent with his two earlier email accounts, which cast doubt over his credibility;

    e. He breached information security procedures by storing confidential documents in his rucksack and/or car.

46. Ms Dyer recommended that a disciplinary hearing be arranged to consider whether the claimant had been negligent in his duties on 9 July 2019 in the

ways itemised above. She continued the claimant's paid suspension in the interim.

Disciplinary hearing and dismissal

47. The claimant was asked by letter dated 29 November 2019 to attend a disciplinary hearing arranged for 12 December 2019 [268]. It was to be chaired by Mr Neil Coltart, Group Manager (Trading Standards). It was stated that Ms Karen Broadley, Assistant HR Manager, would also attend.

48. The hearing invitation letter enclosed a copy of Ms Dyer's investigation report plus its appendices as referred to in the body of the report. It set out four alleged examples of negligence on the claimant's part said to have occurred on 9 July 2019, namely:

    a. Meeting a client outside of working hours and contrary to accepted procedures;

    b. Failure to report the matter;

    c. Breach of information security procedures; and

    d. Failure to report timeously a violent incident which occurred.

49. The letter warned that disciplinary action up to summary dismissal was a possible outcome.

50. The claimant attended the disciplinary hearing along with his trade union representative Tricia McLeish. In addition, Ms Dyer was present. Mr Coltart chaired the meeting and Ms Broadley took notes [156-175]. Ms Broadley's notes were rendered into a typed version at a later point [176-182].

51. After introductions had been made, Ms Dyer presented the management case against the claimant. He and his representative were given the opportunity to ask Ms Dyer questions.

52. Ms McLeish said that the claimant admitted allegations 1,2 and 4 but had mitigating evidence. He disputed allegation 3. She said he had never done anything similar before and his behaviour was erratic because his state of

mind was affected by personal circumstances such as his divorce and ongoing proceedings to gain custody of his son. He had also been lacking sleep. She also pointed out that the claimant had brought it to the respondent's attention, and the business itself had not complained, which cast doubt on their position.

53. On his own behalf the claimant repeated some of those points. He highlighted that the investigation process – and his suspension – has taken almost five months to complete and this had caused him a great deal of stress.

54. Ms McLeish asked Mr Coltart to take into account the claimant's previously clear disciplinary record, the mitigatory evidence, and the nature of the work itself. She said malicious complaints were something that regrettably happened in the claimant's line of work.

55. Mr Coltart took some time to ask the claimant to explain his account of the events of 9 July 2019. The claimant acknowledged that there was a number of inconsistencies between his account as given during Ms Dyer's investigation and the two separate accounts contained in his emails of 10 and 25 July 2019. He put this down to a combination of stress, tiredness and the medication he had been prescribed in August 2019.

56. Mr Coltart adjourned the hearing to reach a decision. Before doing so he asked both the claimant and Ms Dyer if they felt they had received a fair hearing. Both said yes.

57. The claimant's evidence was that Mr Coltart said as he adjourned the meeting: "*You people are all the same."* The claimant took this to be a comment directed at his race. Mr Coltart denied making the comment, or any comment like it. Ms Broadley did not hear it and expected that she would have done as she was only a few feet away. It is found that on the balance of probability the comment was not made by Mr Coltart. It would be a very surprising and incriminatory thing for him to say in that context. We can see no reason why he would, even if that was his personal view (which is not a finding we make). We agree that Ms Broadley would have seen and heard Mr Coltart make the comment if it had been made. Further, the claimant did not respond to it at the

time, did not raise it in his appeal and did not say anything about it in his witness statement. Given that his case is based on an allegation of race discrimination, we would have expected such a compromising comment to have been something he raised in clear terms.

58. Upon adjourning the hearing Mr Coltart reached the decision to dismiss the claimant summarily. The hearing was resumed and he confirmed his decision verbally to the claimant, together with the option to appeal against the decision. He does not appear to have gone into any detail at that time over his reasons, but said that they would be stated in the dismissal confirmation letter to follow.

59. The claimant's last day of service with the respondent was therefore 12 December 2019.

60. Mr Coltart's decision was confirmed in a letter to the claimant dated 13 December 2019 [183-184]. He said that all of the allegations were well founded. He accepted the claimant's argument that the documents which were taken from him were copies of documents already in the client's possession, but believed the claimant had generally failed to adopt a system of securely storing work documents, and it could not conclusively be assumed that the person who took the documents from him was a representative of the client. He acknowledged that the claimant had been experiencing difficult personal circumstances which had had an impact on his health, but did not find that this excused the claimant the lapses he had made.

61. The letter confirmed that the claimant had a right of appeal which had to be exercised within 14 days.

Appeal

62. The claimant exercised his right of appeal by letter dated 20 December 2019 [188]. The basis for his appeal was said to be that:

"I do not believe that any of the mitigation presented by my Trade Union on my behalf were taken into consideration, and that the decision to dismiss me was unduly harsh."

63. Along with his appeal letter he provided the following for consideration as part of the appeal:

    a. A reference letter from his former line manager Paul Birkin;

    b. A letter from his GP providing details of care and medication provided to the claimant;

    c. A letter from his solicitors relation to his separation from his wife;

    d. An email from a member of staff present at the Doublet bar on the night of 9 July 2019; and

    e. Some photographs of Barrington Drive and Great Western Road in Glasgow.

64. He received a letter dated 6 January 2020 confirming that his appeal would be heard by the respondent's appeal committee [185]. The respondent's customary approach to hearing appeals against dismissal is to convene a panel of three individual Councillors from a pool.

65. An appeal hearing was scheduled for 25 February 2020. The panel was made up of Councillors Ferns, Balfour and Letford. Ms Jacqueline McCormack supported them from an HR perspective. The claimant attended along with a different trade union representative from the one who had accompanied him before, namely Mr Jim Main. Mr Coltart attended to explain his decision to dismiss. Ms Broadley from HR was also present to assist him with that. A written note of the proceedings was taken [288-312].

66. The panel confirmed to the claimant on the day that his appeal was refused. This was confirmed by a letter of the same date [313]. It did not provide any reasons, but simply stated that:

    "The Personnel Appeals Committee has concluded that the decision to dismiss you is reasonable in the circumstances and therefore your appeal is rejected."

67. The respondent does not offer any further right of appeal beyond this stage.

Post-termination matters

68. The claimant managed to secure a similar role with another local authority in February 2022. His salary and benefits are the same as they would have been had he remained in the respondent's employment.

69. In the interim he applied for eight positions. He did not apply for more as he was working for his family's food takeaway business at the same time. He stated that he did not earn any money from doing so.

70. He also said that his ability to seek work was negatively affected by the respondent's treatment of him in the form of the prolonged suspension and investigation procedure, and his dismissal. He did not provide any medical evidence to support this claim. He said that the effect of the Covid-19 pandemic was to make it difficult if not impossible to make an appointment with a GP to discuss the matter.

The claimant's comparator – Mr Tonner

71. The claimant made reference to another employee of the respondent named Mr Tonner as his comparator. Mr Tonner is white and Scottish. He was not a Technical Officer in relation to food standards, but was a Trading Standards officer and had many similar duties and responsibilities.

72. In May 2018 Mr Tonner was charged by police with an offence of breach of the peace. A trader had complained about him. The allegation was that Mr Tonner had used racially inappropriate language towards the trader in December 2017.

73. Mr Tonner telephoned Mr Coltart, his line manager, a number of times that day to report that the trader had made a complaint, that the police had made contact with him and then that he had been charged. He was given alternative duties away from the public and the trader who had complained. He then was absent for a period of time through illness and was not working at all.

74. Mr Tonner protested his innocence. He maintained he had done nothing wrong. The claimant denied he had done anything criminal, but did admit to lapses in procedure and breaches of duty.

75. Mr Tonner was not suspended. He was not asked to submit a data subject access request to Police Scotland to obtain details of any criminal investigation or proceedings, as he knew what the charge against him was. A disciplinary investigation was started but it was paused to allow for any criminal process to run its course. He provided evidence suggesting he had not visited the trader who made the complaint at the time she said he had racially abused her.

76. The charges against Mr Tonner were dropped. The internal investigation was then abandoned. He was not dismissed and no other disciplinary action was taken against him.

Discussion and conclusions

Comparator

77. The tribunal first considered whether the claimant had identified a valid comparator in Mr Tonner.

78. Mr Tonner was from a different racial background to the claimant, and initially appeared to be in comparable circumstances to those of the claimant. That is to say, he did a similar job inspecting businesses run within the respondent's boundaries and had the ability to report breaches of relevant regulations and make recommendations for remedial action. Further, a complaint was made against Mr Tonner by a business proprietor who alleged he had acted inappropriately in a criminal way by using racially charged language. The matter was reported to police who spoke to him. In all those respects the details were substantially the same as for the claimant.

79. However, there were clear differences also. Mr Tonner immediately notified his line manager in detail of the complaint and the fact that he had been charged. This mattered to the respondent as it could remove him from situations where something similar could occur again, until it was established

whether the complaint was valid. That could not be done with the claimant in the period of over two weeks it took for him to notify the respondent of the events of 9 July 2019, meaning that he was potentially exposed to further risk and so were his colleagues. Also, Mr Tonner did not need to seek details of the potential charge, and whether he would be charged at all, as the police confirmed that information on the day of the complaint itself. There were differences also in what happened. Mr Tonner did not meet the trader out of hours or otherwise depart from normal working practices when the incident occurred, but rather was accused of using inappropriate language in the course of his normal duties. There was no suggestion of an information security breach.

80. Crucially, the tribunal reminded itself that the claimant was not dismissed because he had been complained about by a third party or made the subject of potential criminal proceedings. He was dismissed for breaches of his duties as a Technical Officer and the respondent's standards and procedures which applied to him.

81. The tribunal therefore reached the view that overall Mr Tonner was not a valid comparator. There were differences between his circumstances and those of the claimant, other than race, which were material to how he had been treated by the respondent.

Less favourable treatment and whether on grounds of race

82. The tribunal nevertheless went on to consider whether the claimant was less favourably treated than his comparator by reason of race.

83. We reminded ourselves of the burden of proof which applies to claims under section 13 of the Act. The onus initially is on the claimant to establish not only the presence of a protected characteristic and less favourable treatment but 'something more' than that which at least suggests discrimination related to the protected characteristic. If there is not that third factor, then a claimant will not shift the burden of proof onto the respondent to justify its actions (or omissions) and the claim will likely fail.

84. Alternatively, if something more than those two elements can be pointed to by a claimant, the burden moves to the respondent and it will have to explain the apparent imbalance in treatment. If it cannot do so, the claim will be likely to succeed.

85. The 'something more' element has alternatively been described as 'primary facts' in the case of ***Madarassy v Nomura International plc [2007] ICR 867***. Importantly, a claimant does not have to conclusively prove the primary facts they rely on before the onus of proof transfers to the respondent, but there must be some evidence to support them so that they at least could (rather than must) lead the tribunal to conclude that discrimination was all or part of the reason for the treatment in question, once all of the evidence in the case has been heard and evaluated.

86. The tribunal could find nothing in the evidence which was suitable to transfer the onus of proof from the claimant to the respondent. Partly this was because he had been unable to identify an appropriate comparator, and so any attempt to identify primary facts suggesting discrimination led to recognition that the reasons why Mr Tonner was treated differently were related to other differences in his situation than race. Our conclusions were therefore:

    a. That the claimant was less favourably treated than Mr Tonner, by being dismissed when Mr Tonner was not;

    b. There was the differentiating feature of race between the two individuals; but

    c. All of the primary facts tending to show why the respondent had treated the two individuals differently pointed to other differences between their respective circumstances than race – we could not identify any primary facts which suggested race was even part of the reason for the less favourable treatment of the claimant.

87. Therefore owing to the way the burden of proof operates, the claimant was unsuccessful at the first hurdle (even if his comparator was valid, although we found that it was not).

88. As a separate point, we were satisfied in any event with the respondent's own case in relation to why it had dismissed the claimant, and not dismissed Mr Tonner. Again, this came back to the key differences between their circumstances as discussed above in our findings of fact. We were satisfied that, in the absence of any evidence of discrimination based on race, the respondent genuinely believed that the claimant had been culpable of serious negligence in the performance of his duties, not least because he admitted the conduct on which that assessment was based, and that his dismissal was an appropriate sanction. Equally they persuaded us on the evidence that they genuinely believed the complaint against Mr Tonner, who maintained he was innocent, to have been unfounded and that there was a lack of evidence of wrongdoing on his part.

Conclusions

89. The tribunal noted that the claimant had experienced discrimination on a number of occasions, including in his professional life, before becoming employed by the respondent and the events with which his claim was concerned. The tribunal also accepted that the claimant genuinely believed that he had been the victim of racial discrimination in connection with his dismissal and the process leading up to it. However, on the basis of the evidence and the operation of the relevant law, his claim is unsuccessful.

90. Accordingly there is no need to consider matters relating to losses and compensation, and the claim requires to be dismissed.

Employment Judge: Brian Campbell
Date of Judgment: 08 November 2022
Entered in register: 09 November 2022
and copied to parties