Case No: 2307838/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr D Niedzialek

Respondent: Korea Foods Company Ltd

Heard at: London South **On:** 27th, 28th February and 1st March 2023

Before: Employment Judge Reed, Mr Townsend and Ms Wickersham

Representation
Claimant: In person
Respondent: Laura Kaye, Counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal is not well-founded. The Claimant was not unfairly dismissed.

2. The Respondent did not directly discriminate against the Claimant because of his race in contravention of section 13 and 39 of the Equality Act 2010.

REASONS

Introduction

1. Mr Niedzialek, the claimant, was formerly a Warehouse Manager of the Korea Foods Company Ltd, the respondent. In 2020 he was involved in the decision to dismiss two employees for theft. This triggered a walkout by five other members of staff. There was a disagreement between Mr Niedzialek and the senior managers of the respondent about how best to deal with this. This ultimately led to him resigning. He subsequently returned, but after further disagreement, resigned once more. He alleges that the respondent's actions amounted to a breach of the implied term of trust and confidence, meaning that he was unfairly dismissed.

2. In addition Mr Niedzialek says that the respondent's actions occurred because he is Polish, rather than Korean.

Claims and issues

3. Mr Niedzialek brings claims for constructive unfair dismissal and direct race discrimination.

4. At the preliminary hearing on the 24th November 2021 the issues were agreed as set out below. The parties confirmed their accuracy at the beginning of this hearing.

1. **Time limits**

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.1.2 If not, was there conduct extending over a period?
1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.1.4.1 Why were the complaints not made to the Tribunal in time?
1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Constructive unfair dismissal**

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:
2.1.1.1 On 20 July 2020, the Manager Director, Dan Suh, refused the claimant's request made on 10 July 2020 for an independent manager to conduct a formal investigation into the "whole situation" concerning employees leaving the premises on 3 July 2020.
2.1.1.2 The respondent failed to deal with the claimant's grievance about Lewis Miller [Dong il Oh] made on or around 2 August 2020.
2.1.1.3 The respondent failed to offer the claimant a right of appeal against either of the above actions.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

3. **Remedy for unfair dismissal**

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the claimant?

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

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

3.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.1.5 If so, should the claimant's compensation be reduced? By how much?

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

3.1.7 Did the respondent or the claimant unreasonably fail to comply with it?

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

3.1.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

3.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.1.11 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

3.2 What basic award is payable to the claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. **Direct race discrimination (Equality Act 2010 section 13)**

4.1 The claimant's nationality is Polish. He compares himself with a person or people of Korean ethnicity.

4.2 Did the respondent do the things at paragraph 2.1.1 above?

4.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who s/he says was treated better than s/he was.

4.4 If so, was it because of race?

4.5 Did the respondent's treatment amount to a detriment?

5. **Remedy for discrimination or victimization**

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

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

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

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

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

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

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

5.9 Did the respondent or the claimant unreasonably fail to comply with it?

5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

Procedure, documents and evidence heard

5. The tribunal heard evidence from the Mr Niedzialek, the claimant, and on his behalf from Mr Maurice Cox, who had previously been an Assistant Warehouse Manager at the Respondent. The tribunal heard evidence on behalf of the respondent from Samuel Wainaina and Dan Suh.

6. There was an agreed bundle of documents of 261 pages. References to page numbers are references to that bundle unless otherwise indicated. There had been several additions to the bundle, which have been numbered with decimal numbers, e.g. 100.1, 100.2, etc.

Findings of fact

7. The respondent is a substantial business importing Asian foodstuff into the UK. It operates two warehouses, one in Birmingham and one in New Malden. It employs approximately 300 employees, included approximately 30 in the New Malden warehouse.

8. Mr Niedzialek was employed as the Warehouse Manager at the New Malden warehouse. He was engaged in that role from 12th March 2018.

9. The respondent is a family business. There are two Managing Directors, Yooni Sui and Dan Suh. They are brothers. Their father, Bernard Suh, is the founder and Chairman of the company. Although he is older than the state retirement age, he remains actively involved in the business. Dan Suh described Bernard Suh as having the ultimate say in how the business is run. He referred to him as having 'the rubber stamp', by which he meant that he would generally be the person who held the final authority over a decision.

10. Like many family businesses, the respondent was often run in a more ad hoc and informal way than might be expected in a more corporate environment. Mr Niedzialek and Mr Cox described there effectively being three bosses, who all wanted different things. Mr Cox noted that when he had been hired nobody had

told Mr Niedzialek until the decision had been made. On a number of occasions, Dan Suh gave evidence that he was unaware of important decisions made by Bernard Suh where he was not consulted. The Managing Directors and Chairmen took a more active role in day to day operations than might ordinarily be expected. Mr Niedzialek described them as 'very hands on' and said that they sometimes skipped over him to speak directly to more junior staff, causing confusion.

11. Within the warehouse interactions between the operatives were informal. It was also usual for the operatives to mock each other, which was normally friendly banter. It could, however, be a stressful environment and more serious disagreements did occur. Swearing was common, but generally not directed towards another person, unless in jest. Swearing directly at a manager or supervisor was unusual and would have been understood to be a form of insubordination.

12. The respondent employed a diverse workforce. Mr Suh referred to British, Polish, Hungarian, Bulgarian, Ugandan, Kenyan, Sri Lankan, Chinese and Korean employees employed at New Malden. This included a significant number of Korean employees, who formed approximately one third of the warehouse staff.

13. The Tribunal concluded that the Korean employees did form a distinct group within the workplace. The witnesses all tended to refer to 'the Koreans' as a group and the same terminology occurred in the documents provided. The Korean employees were connected by a shared ethnic background and language – many did not speak English.

Background to walk out

14. In early 2020 there was an ongoing problem of theft at the warehouse, which Mr Niedzialek was trying to deal with. He had received reports that staff had been helping themselves to the food products. Mr Cox referred to this as 'grazing' on food during work. Mr Niedzialek had called a meeting to make it clear that it was unacceptable. This, however, did not stop the problem.

15. Around May 2020, Mr Niedzialek investigated two employees for theft. He recommended their dismissal. That recommendation was accepted by Bernard Suh and the employees were dismissed. One of the employees dismissed was European; one was African.

16. Around June 2020 Mr Niedzialek investigated two Korean employees for theft. Again, he recommended their dismissal and this recommendation was accepted by Bernard Suh. Mr Niedzialek communicated that decision to the two employees on 3rd July 2020.

17. Following Mr Niedzialek' meeting with those employees, the dismissals triggered a verbal altercation between some of the warehouse operatives and the Assistant Managers, which was then joined by Mr Niedzialek. Mr Cox described operatives shouting and kicking stock around in anger. Mr Niedzialek describes being surrounded by warehouse operatives who were shouting at him.

18. Ultimately, five operatives walked out in protest. All five were Korean. This included Mr Dong il Oh (also known as Lee Miller), the brother of one the dismissed employees.

19. Mr Niedzialek says that, on their way out, two of these employees were verbally abusive towards him. Mr Oh raised his middle finger and told Mr Niedzialek to 'fuck off'. The other stepped aggressively towards Mr Niedzialek and also told him to 'fuck off'. Mr Oh went onto say that that he was quitting, described the company as 'a shit company' and said that he would never return.

Events following the walk-out

20. Dan Suh describes the walk out as leaving the respondent with a serious staff shortage. Seven employees (including both the walk outs and the two dismissed) were a significant proportion of the workforce. His evidence was that respondent was already understaffed and trying to recruit, so losing more staff created a crisis. Mr Niedzialek agreed that the staffing levels had reached a state of real distress, but noted that they were able to get orders out successfully.

21. Both Mr Niedzialek and Dan Suh agreed that they spoke a number of times about the situation in the days following the dismissals and walk out. Some of these meetings also involved Bernard Suh and the respondent's HR manager. They were attempting to keep the warehouse running effectively with the reduced staff and also discussing what to do about the employees who had walked out.

22. They disagreed with the best approach to take. Dan Suh and Mr Bernard Suh wanted to take a conciliatory stance. They wanted to try to persuade the employees to return and talk to them about why they had gone so far as to walk out. In part this was pragmatic – they did not want to lose a significant number of workers given the staffing situation. In part it was altruistic. They saw themselves as good employers operating a family business and wanted to treat their staff well.

23. Mr Niedzialek wanted to take a firmer line. Understandably, he had little sympathy with employees walking out because their colleagues had been dismissed following an admission of theft – especially given the history of theft problems and his earlier warning to staff. He also viewed the aggressive protest as being unacceptable misconduct. He felt that allowing staff to return without some form of action set a poor precedent and risked creating problems in the future.

24. Both Dan Suh and Mr Bernard Suh met with the employees who had walked out and sought to persuade them to return. In the course of those discussions a number of the employees expressed unhappiness with Mr Niedzialek's leadership, in particular the way that the dismissals had been dealt with. They also said that he could be abrupt with employees. They also felt that there had not been sufficient warning to the Assistant Managers about the possibility of the dismissals and the dismissed staff had been escorted off the premises in a humiliating way.

25. Although Dan and Bernard Suh appear to have been sympathetic to some of the criticisms of Mr Niedzialek's handling of the dismissals, in the Tribunal's experience, he had done nothing unusual or untoward. It is not uncommon for employees dismissed for theft to be escorted off an employer's premises. In a warehouse it was almost inevitable that this would be observed by other employees. It is suggested that Mr Niedzialek did not inform his assistant managers about the dismissals in advance, but again that is not unusual. It is also notable that, although Mr Niedzialek had been the one to communicate the outcome, the decision to dismiss had been taken by Bernard Suh.

26. In the course of these discussions Dan and Bernard Suh persuaded four of the five employees to return to work. Mr Oh declined to return at this stage. There were also discussions between Dan Suh and Mr Niedzialek about the situation. Mr Niedzialek was aware that Dan and Bernard were speaking to the employees, but he was not part of those discussions.

27. On the 7th July Mr Niedzialek and Dan Suh met to discuss the situation. Mr Suh followed up the meeting with an email, p104.5. It is clear that, at this stage, Mr Suh was anticipating that some or all of the employees would return. Mr Niedzialek agrees that he was told this by Mr Suh. He accepted in cross-examination that he did not object to the employees returning, but said that he made it clear that he wanted there to be some form of investigation into their absence and the situation generally. The Tribunal concluded that he put this as something like 'I have concerns' but did not express a firmer position or try to insist on an investigation, although he was clear in his own mind that something should be done. At the same time, Dan Suh had reached the view that any kind of formal investigation or disciplinary process would be counterproductive, but did not say so directly to Mr Niedzialek.

8th July

28. On 8th July four of the walk out employees returned to work. Mr Oh did not.

9th July Meeting

29. On 9th July Mr Niedzialek and Dan Suh met again to discuss how to proceed. Everyone, by this point, was frustrated and stressed by the situation they were in.

30. Both had reached firm views about what should be done, but these had not been clearly communicated to the other. The meeting therefore began with both participants in entrenched positions, without fully appreciating that the other person was similarly determined. Also, the employees having now returned, it was becoming more difficult in practice to alter course.

31. Dan Suh explained that he and Bernard Suh had met with the employees who had walked out and that four would be returning to work. Mr Niedzialek expressed his unhappiness about this. He said that other staff were disappointed in the way things had been handled, because they'd had to pick up the slack when their colleagues had walked out. Mr Niedzialek continued to

express his view that there should be an investigation and that, in particular, the period of absence since the 3rd July should be treated as unauthorized absence.

32. Mr Suh tried to persuade Mr Niedzialek that further investigations or disciplinary action were unhelpful and that they needed to minimize the disruption to the business. Mr Niedzialek did not agree. Mr Suh asked something to the effect of 'Why don't you work with me? Why are you putting up walls?' In his evidence, he described his frustration that, in his view, Mr Niedzialek was creating obstacles, not solutions. Mr Niedzialek was similarly frustrated because, in his view, Mr Suh was ignoring misconduct by the operatives which should be addressed.

33. The meeting became acrimonious. Mr Suh accepts that he became frustrated and shouted at Mr Niedzialek. In response Mr Niedzialek threw down his pen and left the meeting.

Resignation

34. Mr Niedzialek returned a short time later and handed Dan Suh a letter of resignation, p114. He resigned on notice, suggest his last day at work would be 7th August 2020.

35. The resignation letter is brief and does not give any reason for the resignation. The Tribunal accepts Mr Niedzialek's evidence that he felt the refusal to investigate was wrong and he was upset by Mr Suh losing his temper over it. He resigned in response to those events.

10th July Meeting / Email

36. After the passage of time neither Mr Niedzialek and Dan Suh had a clear memory of the exact sequence of events on the 10th. Both agree that they spoke and the emails between them are in the bundle.

37. On balance, the Tribunal concluded that there was an initial conversation before Mr Niedzialek's first email. The email reads as if it follows on from developments following Mr Niedzialek's resignation. In particular, Mr Niedzialek begins the email by thanking the directors – this is an odd beginning if his last interaction with Dan Suh had been resigning following their argument.

38. Mr Suh apologised for shouting and sought to deescalate the situation. It is likely, particularly given his concerns about staffing levels, that he had in mind the possibility of persuading Mr Niedzialek to withdraw his resignation. Mr Niedzialek had also had the chance to reflect and was considering the possibility of staying on. Mr Suh referred to everyone being very stressed by the events and said that he appreciated Mr Niedzialek's position.

39. Given the subsequent emails the Tribunal also concluded that Mr Niedzialek suggested that he might be willing to return if his request for a formal investigation was granted.

40. Following that discussion, Mr Niedzialek emailed Dan, Yooni and Bernard Suh formally requesting an investigation into three of the walk out employees on the basis that they had been absence without leave, p106.

41. Dan Suh met with Mr Niedzialek the same day to discuss the email. Mr Niedzialek confirmed that he intended to persist in his resignation if there was not an investigation. Mr Suh asked him to clarify what he wished to be investigated. Mr Niedzialek replied by email, p105. He referred to the company absence policy and said that he thought it was desirable to bring in an investigator from outside to consider the situation objectively.

20th July Meeting

42. On 20th July 2020 Dan Suh held a meeting with Mr Niedzialek to discuss the situation. The respondent's HR manager also attended to take notes, p108. The Tribunal accepted that the notes are an accurate account of the meeting.

43. This was described as a without prejudice meeting, although at this stage there was no obvious prospect of litigation.

44. Mr Suh said that the directors had reviewed the situation and decided that they would not proceed with a formal investigation. He said that they felt that, in previous occasions where employees had walked out no action had been taken. He said that, as a family run business they wanted to listen to employees, use diplomacy and not be overly hard. He suggested, however, that policies and procedures should be reviewed.

45. Mr Suh went on to say that he understood that Mr Niedzialek's decision to resign had been based on the respondent's unwillingness to undertake an investigation and so he presumed that it still stood. He suggested, however, that the respondent would agreed to a longer notice period to allow Mr Niedzialek more time to find a new job, subject to a settlement agreement.

46. Mr Suh also emailed Mr Niedzialek in similar terms following the meeting, p109-110.

Retraction of resignation

47. A few days later Mr Niedzialek spoke to Mr Suh and asked to withdraw his resignation.

48. In cross-examination, Mr Niedzialek said that he had received reassurance from Dan Suh that things would get better and that 'we were past the worse'. The Tribunal accepted that they had had conversations along these lines. Mr Suh and Mr Niedzialek agreed that they had spoken during this period in the course of work and, no doubt, Mr Suh encouraged Mr Niedzialek to stay.

49. At the same time, there was no significant change in the respondent's position on how the walkout would be dealt with. Mr Suh had indicated clearly that there would not be a formal investigation. Mr Niedzialek does not suggest that this decision was reversed. He says that he was told that Mr Oh would not be

returning. The Tribunal found that Mr Suh did refer to the fact that Mr Oh had left and so would not be an issue anymore. This did not, however, involve Mr Suh making any specific promise. It simply reflected the current position and their joint expectation for the future.

50. Mr Suh sought legal advice and, based on that advice, told the other directors that they were not required to accept Mr Niedzialek change of mind. He said, however, that he did not see any reason to refuse.

51. Mr Niedzialek was therefore permitted to withdraw his resignation.

2nd August: Mr Oh's return and second resignation

52. On 2nd August Mr Niedzialek encountered Mr Oh at the warehouse. He was shocked and contacted Dan Suh to ask what was going on. At that point, Mr Suh did not know any more than Mr Niedzialek. He spoke to Bernard Suh and learnt that he had decided to reengage Mr Oh. Mr Oh had decided that he wished to return to work after all. Two of the other Korean employees had interceded with Bernard Suh, who had decided to allow him back.

53. It should be noted that, although Dan Suh says that Bernard Suh had been told that Mr Oh had done nothing wrong, this was, at the very least, contestable. His actions may have been understandable, in that he was reacting emotionally to his brother having been dismissed. But he had still been insubordinate to Mr Niedzialek by swearing at him and left work.

54. The Tribunal accepted Dan Suh's evidence that he had not been told or consulted about any of this and Mr Oh's arrival was as much a surprise to him as it was to Mr Niedzialek.

55. The Tribunal concluded that, to a significant extent, there had been a failure to communicate between Dan Suh and Bernard Suh. It had been Dan Suh who had primarily dealt with Mr Niedzialek. He was therefore aware how strongly Mr Niedzialek felt about the walkout. He also knew that Mr Niedzialek had said that Mr Oh had been abusive during the walkout. Bernard Suh had been less involved and appears to have underestimated the significance of reengaging Mr Oh. Had he appreciated that, at the very least, he would have been likely to inform Dan Suh or to discuss the decision with him.

56. Dan Suh relayed this account to Mr Niedzialek. Mr Niedzialek decided that he was not willing to continue under these circumstances and resigned.

Reason for resignation

57. The Tribunal was satisfied that Mr Niedzialek resigned in response to the decision to allow Mr Oh to return.

58. The Respondent suggest that Mr Niedzialek had another job lined up and that was why he left. The Tribunal accepted Mr Niedzialek's evidence that he had been approached by a recruitment agency prior to his resignation, but not been offered a job until after his resignation. The fact that he was confident he would

be able to secure a similar role elsewhere no doubt played a role in his decision, but Mr Oh's return remained the dominant factor.

Formal complaint

59. Mr Niedzialek did raise a formal complaint on the 3rd September 2020, p117-118. This related to an incident on the 2nd September when Mr Oh refused an instruction from Mr Niedzialek.

60. The respondent's HR manager attempted to arrange a formal meeting. There were, however, various delays and this had not occurred at the point that Mr Niedzialek had left. At that point the process was abandoned. Dan Suh said that, at that stage, he took the view that it was better to see how Mr Oh performed under a different manager.

Other matters from which Mr Niedzialek suggests inferences should be drawn

61. Mr Niedzialek relies upon a number of further factors / incidents that he suggests support his allegation that in general Korean employees were treated better than non-Koreans by the Respondent. This he argues supports his contention that he was treated less favourably than a Korean in the same position would have been.

Analysis of pay

62. The tribunal was provided with a spreadsheet detailing the salaries and roles of warehouse operatives, 130.1. Mr Niedzialek argued that this demonstrated that, in general, Korean employees were paid more than other employees. He invited the tribunal to draw an inference from this that, in general Korean employees were favoured over others.

63. The tribunal concluded that it was not appropriate to draw such an inference.

64. There were indications that supported Mr Niedzialek's argument that an inference should be drawn. For example, among the five lowest paid employees, four were of European origin, with only one Korean. At the same time, there were indications to the contrary, for example, the highest paid employee was Mr Niedzialek, who was Polish and, in 2019, the highest paid warehouse operative was of European origin. Both parties accepted that some of the differences between employees arose from different skills or experience. For example, some operatives were qualified to operate a reach forklift (used to move elevated pallets). This was a more responsible, skilled role that required a particular qualification. It was therefore paid more.

65. The Tribunal also bore in mind that in the small population of 21 employees provided it was difficult to draw firm conclusions safely. In practice, that sample size was further reduced, because Mr Niedzialek as Warehouse Manager was not directly comparable with anyone else and the Warehouse Assistant Manager / Supervisors were not directly comparable with the Warehouse Operatives.

Bernard Suh's remarks

66. Mr Niedzialek says that, on a number of occasions, Bernard Suh referred to English and European people as useless and lazy; and said that Koreans were better employees because they worked harder.

67. Dan Suh agreed that his father did sometimes comment on the difference between European and Korean employees, but said that his comments were less one-sided than Mr Niedzialek suggested. He said that Bernard Suh's did believe that, on a broad level, there were differences between the average Korean and the average European employee; although he recognized that individuals varied widely. Dan Suh said that his father's view was that, in general, Koreans tended to be hard workers, but had less initiative than European employees. He thought that Europeans were not always as committed, but tended to be more proactive in solving problems as they came up.

68. Overall, the Tribunal accepted Dan Suh's account of Bernard Suh's views and statement over Mr Niedzialek's. The respondent's diverse workforce and its employment of European employees in senior roles was not congruent with a Chairman who believed that English or European employees were useless.

69. The Tribunal's experience is that it is not unusual, in workplaces containing distinct ethnic or national groups for there to be discussion of the different characteristics of those groups. There is nothing inherently wrong or discriminatory about that. It does, however, indicate a degree of categorization by race and can often involve stereotyped thinking.

Other disciplinary actions

70. Mr Niedzialek refers to a number of other occasions where disciplinary action was taken or considered, which he suggests supports his allegation that Korean employees were treated more favourably in general.

71. Mr Niedzialek refers to an incident in June – July 2018 when a reach truck driver was dismissed because he was rude to a Korean employee. In cross-examination Mr Niedzialek agreed that he had investigated the incident and recommended that the matter proceed to a disciplinary on that basis that there had been gross misconduct. He had agreed with the decision to dismiss. In these circumstances, it was not appropriate to draw any adverse inference from this incident.

72. Mr Niedzialek refers to an altercation in December 2019 when one of the respondent's butchers physically pushed him and was verbally abusive during an argument about the use of a trolly. The butcher was Korean. The incident was investigated and the butcher was issued a written warning. The Tribunal did consider this an unusually lenient sanction given the circumstances.

Recruitment and role of Mr Choi

73. Mr Choi was engaged by the respondent in Spring 2019 while Mr Niedzialek was on annual leave. He had previously worked for the respondent's main competitor. Dan Suh described him as being a contractor, by which he meant that he was engaged on a flexible basis, rather than as an employee. In practice, however, he appears to have worked consistently in an Assistant Manager role.

74. Dan Suh's unchallenged evidence was that other employees had also been recruited from the competitor at the same time.

75. There appears to have been a certain amount of conflict between Mr Niedzialek and Mr Choi. Mr Niedzialek says that, on occasion, Mr Choi swore at him. Dan Suh described them as having different communication styles. The Tribunal notes that it seems unusual for no action to be taken over an Assistant Manager swearing at his direct line manager.

76. In cross-examination Mr Suh was challenged about Mr Choi's suitability of the role of Assistant Manager and the fact that he had been appointed without Mr Niedzialek's involvement. This case is not about Mr Choi and it not necessary to resolve all these factual disputes. The Tribunal did think it was unusual to have recruited an Assistant Manager without involving the Warehouse Manager.

77. We accepted, however, Mr Suh's evidence that – whatever Mr Niedzialek's views – the respondent recruited him because they believed he would be an asset and had valuable skills to offer the business. It was not an attempt to undermine Mr Niedzialek or replace him. Mr Choi being recruited without Mr Niedzialek's involvement occurred because Mr Niedzialek was on holiday at the time and because the respondent's generally informal approach to such matters (seen in both Mr Cox's recruitment and the decision to reengage Mr Oh).

78. The Tribunal noted, in particular, that after Mr Niedzialek left it was Mr Cox who was offered the role of Warehouse Manager, although he refused that offer.

The law: Unfair dismissal

Direct discrimination

79. Following s13 and s39 of the Equality Act 2010, we must determine whether the respondent, by subjecting the claimant to a detriment, discriminated against him by treating him less favourably than it treated or would have treated someone else, because of a protected characteristic.

80. In this case the protected characteristic relied upon by the claimant is his race, in particular that he is Polish rather than Korean.

81. A detriment is anything that a reasonable person in the claimant's place would or might consider to their disadvantage. It does not require that there be physical or economic consequences for the claimant – but an unjustified sense

of grievance is not a detriment, see *Shammon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

82. Consideration of direct discrimination is an inherently comparative exercise. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator was or would be. The comparator may be an 'actual comparator'; that is someone in materially the same circumstances of the claimant. The tribunal may also need to consider how a 'hypothetical comparator' would have been treated. In some cases, identifying a suitable hypothetical comparator may be difficult and it may be appropriate to focus on considering why a claimant was treated in a particular way, using any evidence as to how other people are treated to inform that view, even if they are in materially different circumstances.

83. If there has been less favourable treatment, the Tribunal must go on to consider whether that was because of a protected characteristic.

84. In some circumstance, however, separating the question of whether there has been less favourable treatment from the issue of why that less favourable treatment occurred will be artificial or cumbersome. In such cases the Tribunal may consider both questions together – essentially asking whether an employee has been treated less favourably because of a protected characteristic, see *Shammon*.

85. One consequence of this comparative approach is that the fact that someone has been treated unreasonably does not mean that they have been discriminated against. For that matter, an employee who has been treated objectively reasonably may still have been discriminated against if they nonetheless have been treated less favourably than an appropriate comparator because of a protected characteristic.

86. Direct discrimination is not necessarily conscious or deliberate. The tribunal must decide 'what, consciously or unconsciously, was the reason for the treatment', see *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48. For there to be direct discrimination it is sufficient that the protected characteristic be a material influence on the reason for the treatment. It does not need to be the only or main reason for the treatment.

87. In relation to all of this, the burden of proof is on the claimant initially to establish facts form which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated. This requires more than a difference in treatment combined with a difference in protected characteristic, se *Madarassy v Nomura International PLC* [2007] ICR 867. There must be something further from which it could be concluded that the protected characteristic influenced the decision. If this is established it is for the respondent to show that they did not discriminate.

88. If, however, a tribunal is able to make positive findings on the evidence it is not necessary to apply the burden of proof provisions mechanistically. In such a case a Tribunal may proceed directly to considering the reason for the treatment, see *Hewage v Grampian Health Board* [2012] UKSC 37.

Constructive unfair dismissal

89. Unfair dismissal necessarily requires that an employee have been dismissed by their employer. s95(1)(c) of the Employment Rights Act 1996 creates a legal route by which a dismissal can be established on the basis of an employee resigning (with or without notice). This will be deemed to be a dismissal if the employee is entitled to resign without notice, because of the employer's conduct. This is known as a constructive dismissal.

90. For there to be such a constructive dismissal there must be:

    a. A breach of contract by the employer, that is sufficient serious to be repudiatory / fundamental;
    b. The employee must have resigned in response to that breach;
    c. The employee must not have affirmed the contract prior to the resignation.

91. Not every breach of contract is a fundamental breach. The conduct involved must be a significant breach that goes to the root of the employment contract or which demonstrates that the employer no longer intends to be bound to an essential term, see *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761.

92. In this case the Claimant argues that there was a breach of the implied term of trust and confidence. This is an implied term, established in its current form in *Malik v Bank of Credit and Commerce International* [1997] ICR 606. The term requires that an employer must not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer.

93. The test is therefore in two parts. First, whether there has been conduct that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. Second, whether that conduct was without reasonable and proper cause.

94. Any breach of the implied term of trust and confidence will amount to a fundamental breach the contract because there can only be a breach if there is action that is calculated or likely to destroy or seriously damage the employment relationship.

95. The implied term of trust and confidence may be breached by a course of conduct in which a number of acts and omission together amount to a breach of the term – even if the individual actions do not do so, see *Omilaju v Waltham Forest LBC* [2005] ICR 481 and *Kaur v Leeds Teaching Hospital NHS Trust* [2019] ICR 1.

96. In *Kaur* the Court of Appeal laid down guidance for dealing with constructive dismissal claims based on an alleged breach of the implied term of trust and confidence. It is generally sufficient to consider:

    a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    b. Has he or she affirmed the contract since that act?

c. If not, was that act (or omission) by itself a repudiatory breach of contract?
d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)
e. Did the employee resign in response (or partly in response) to that breach?

97. If there has been a fundamental breach of contract, the Tribunal must consider whether that was the reason for the resignation. It must be a substantial part of the reason an employee resigned, but need to be the sole reason.

Conclusions: Unfair dismissal

Refusal of investigation

98. Dan Suh did refuse Mr Niedzialek's request that the employees involved in the walk out be investigated.

99. The Tribunal did find the respondent's approach to the walk out unusually conciliatory. Mr Niedzialek's concerns that, in taking a lenient approach to employees who had undoubtedly committed acts of misconduct, the respondent might be creating problems for the future and risked undermining his position as warehouse manager was not at all unreasonable.

100. At the same time, both Bernard and Dan Suh were managers within the respondent, senior to Mr Niedzialek. They were entitled to make decisions about how the situation should be dealt with and to reach their own conclusions about the appropriate balance between different imperatives. As Dan Suh explained, there were reasons to take a lenient view on this occasion, in particular because of the number of employees involved and the staffing problems at that time.

101. Mr Niedzialek's concerns had been listened to and considered. But Bernard and Dan Suh had reached a different conclusion about the best course of action.

102. Although refusing to investigate potential misconduct could, in principle, give rise to a breach of the implied term of trust and confidence, this would require something significantly more than a reasonable request by a manager being refused. In any organisation there are likely to be occasions when someone wants to take a particular course, but a more senior manager reaches a different conclusion.

103. In many cases that will lead to frustration or annoyance. Not infrequently, the more junior individual may be correct and the more senior one wrong. The decision may be based on a mistake, a misunderstanding or simply be foolish. Or different people may just reach different conclusions. All of this is inevitably in any organisation. No employer can please all its employees all of the time.

104. The Tribunal concluded that there was nothing in this situation that took the situation outside the scope of an exercise of a managerial prerogative that Mr Niedzialek disagreed with.

105. If the decision had been based on Mr Niedzialek's race, that would almost certainly have amounted to a breach of the implied term. The Tribunal, however, concluded that it was not for the reasons set out below.

106. Mr Niedzialek also argues that there was a deliberate attempt to make him resign. If this had been the case, this would have been something calculated to undermine the relationship of trust of confidence. The Tribunal, however, concluded that there was no such attempt. In particular, the Tribunal found that it was extremely unlikely, if any of the respondent managers had wished to manoeuvre Mr Niedzialek into resigning, that they would have allowed him to retract his resignation. As Mr Suh knew, there was no legal requirement to allow him to do so.

107. The Tribunal therefore concluded that, while it was understandable that Mr Niedzialek disagreed with the approach that the respondent was taking, it did not give rise to a breach of the implied term of trust and confidence.

Refusal of grievance

108. The Tribunal concluded that Mr Niedzialek had not raised a grievance about Mr Oh's return to work prior to his resignation. Dan Suh certainly knew that Mr Niedzialek was unhappy with Mr Oh's behaviour, but until he returned to work both believed that he would not be returning.

109. When Mr Oh did return on 2nd August, without Mr Niedzialek being informed, he had contacted Dan Suh, who had initially also been unaware of his return, but then established that Bernard Suh had decided to reengage him. When Dan Suh informed Mr Niedzialek of this, he resigned. He did not raise a grievance until significantly later in September.

110. There was not therefore any breach of the implied term of trust of confidence relating to any failure to consider a grievance that related to Mr Oh's return, since Mr Niedzialek did not raise such a grievance prior to his resignation.

111. The Tribunal did not, however, consider that it was appropriate to take a narrow approach to considering this issue. It therefore went on to consider whether, in reengaging Mr Oh, the respondent had breached the implied term of trust and confidence.

112. The Tribunal concluded that it had not. It was understandable that Mr Niedzialek was annoyed by Mr Oh's return. But there had been no disciplinary action against him or even any formal complaint. No promise had been made to Mr Niedzialek that he would not return, as the other employees had.

113. There was a failure to communicate clearly with Mr Niedzialek, although that would have obviously have been sensible given the situation and his

previous concerns. There was also a failure to communicate clearly among the directors, meaning that Dan Suh was also unaware of what was going on. It also seems likely that Bernard Suh, when he decided to reengage Mr Oh, did not fully appreciate the extent to which Mr Niedzialek was likely to be opposed. If he had been he would, at the very least, surely have warned Dan Suh.

114. All of this meant that the matter was handled tactlessly and caused unnecessary upset to Mr Niedzialek. His unhappiness was entirely natural in the circumstances. The way that the respondent handled the situation fell well short of what might be considered best practice.

115. Ultimately, however, the tribunal concluded that the decision remained within the respondent's managerial prerogative.

116. It was entitled to reengage Mr Oh for the same reasons that it was entitled to reengage the other employees. The implied term of trust and confidence did not extend to giving Mr Niedzialek a veto over such a decision. Both Mr Niedzialek and the respondent took a reasonable, if differing view, but the more senior managers were entitled to prevail. While the failure to communicate with Mr Niedzialek was tactless, the Tribunal concluded that it was not sufficiently serious to amount to a breach of the implied term of trust and confidence.

Refusal of appeal

117. Mr Niedzialek did not seek to formally appeal the decision not to investigate the employees involved in the walk out. It was not, in any event, a matter in which an employee could expect to have a right of appeal.

118. Although, on occasion, both Mr Niedzialek and Dan Suh referred to a grievance, Mr Niedzialek had not raised a formal grievance in the sense that term is used in a HR or employment law context. The decision to reengage the employees had been discussed, Mr Niedzialek's views had been considered, and a decision had been made.

119. In relation to Mr Oh's return, again, Mr Niedzialek had not raised any form of grievance or indeed objection with the respondent before resigning. There was therefore nothing to appeal.

Conclusions: Discrimination

120. Given the findings above, the Tribunal primarily focused on two possible elements of less favourable treatment:

a. The refusal the claimant's request made on 10 July 2020 for an independent manager to conduct a formal investigation into the "whole situation" concerning employees leaving the premises on 3 July 2020.
b. The reengagement of Mr Oh and the failure to inform Mr Niedzialek of it.

121. It was not in dispute that these events occurred. The crucial issue was whether these actions had been done because of Mr Niedzialek's race, as he alleged.

122. The Tribunal concluded that Mr Niedzialek had proved primary facts, from which, in the absence of any other explanation, the tribunal could that the respondent had acted unlawfully. In particular, the Tribunal concluded that the following factors, taken together, were sufficient:

a. The unusually lenient treatment to the employees who walked out, combined with their shared race;
b. The unusually lenient approach to other potential disciplinary matters, in particular the altercation between the butcher and Mr Niedzialek, and Mr Choi allegedly swearing at Mr Niedzialek, in combination with both employees being Korean;
c. The rejection of Mr Niedzialek's firm view that there should be an investigation, despite his role as Warehouse Manager;
d. Mr Niedzialek not being involved in the discussions with those who had walked out, despite his role;
e. Dan Suh's loss of temper when refusing Mr Niedzialek's requests;
f. That Korean employees were seen as a distinct group within the Respondent (for example in the references to the Koreans and Bernard Suh's views on the difference between Korean and European employees).
g. The failure to consult or notify Mr Niedzialek in relation to Mr Oh's return, when it should have been clear he would oppose it.

123. No one of these factors could justify the inference that there had been discrimination. Some are minor and can only give rise to a weak inference. But the Tribunal concluded that taken together they were sufficient to pass the burden of proof to the respondent to show that the treatment was not discriminatory.

124. The Tribunal concluded, however, that the respondent had satisfied that burden.

125. In relation to the decision not to investigate the operatives who walked out, the Tribunal accepted Dan Suh's evidence that the reason for treating the employees leniently was the difficult staffing situation within the warehouse and, less importantly, Dan Suh and Bernard Suh's conclusions that the dismissals could have been handled better. This wholly explains Mr Suh's rejection of Mr Niedzialek's desire for an investigation. Such an approach went entirely against the desire to conciliate with the employees and get them back to work with the minimum of fuss. The Tribunal was satisfied that a Korean in the same position as Mr Niedzialek, making the same request for a formal investigation, would have received the same reply.

126. In relation to the reengagement of Mr Oh, the Tribunal accepted Dan Suh's account of the decision made by Bernard Suh. To a large extent the decision flowed from the respondent's earlier approach to employees who had walked out.

127. In relation to the failure to speak to Mr Niedzialek about this, the Tribunal concluded this had nothing to do with his race. It stemmed both from the fact that Bernard Suh viewed the walkout incident as less significant, at least as a potential disciplinary matter, than Mr Niedzialek did – combined with the generally informal nature of the respondent's workplace.

128. In connection with this point, it was particularly significant that Dan Suh was also not consulted or informed of the decision to reengage Mr Oh. This strongly suggests that Bernard Suh did not have in mind when he reemployed Mr Oh that this might be a cause of problems. If he had he would have been likely to discuss the situation with his son or, at the very least, warn him once the decision had been made.

129. The fact that he did not makes it far more likely that he simply viewed the decision as an extension of the earlier decision to allow those employees who had walked out to return. It did not, therefore, have anything to do with Mr Niedzialek's race, because Bernard Suh did not have Mr Niedzialek in mind when he made the decision.

130. All of this was unfortunate and tactless, since in the circumstances it was bound to frustrate and annoy Mr Niedzialek. But it had nothing to do with Mr Niedzialek's race. A Korean Warehouse Manager in the same situation would have been treated in exactly the same way.

131. In relation to the allegation that the respondent failed to deal with Mr Niedzialek's grievance made on or around the 2nd August 2020, for the reasons set out above the Tribunal had concluded that he had not made any such grievance. There had therefore been no discrimination in relation to any failure to deal with it.

132. In relation to the allegation that the respondent had failed to offer the claimant any right of appeal, the Tribunal concluded that Mr Niedzialek had not established any primary facts that could lead to the finding of discrimination. As set out above, these were not decisions from which the Tribunal would ordinarily expect there to be any right of appeal. The evidence did not suggest that a Korean in the same position as the claimant would have received unusually favourable treatment in this regard.

Employment Judge Reed
25 May 2023