EMPLOYMENT TRIBUNALS

Claimant: Mr Feruzy Juma

Respondent: Shred-it Ltd

Heard at: Manchester **On:** 17, 18 and 20 April 2023

Before: Employment Judge Farrelly
Ms Fulton
Ms Worthington

REPRESENTATION:

Claimant: In person
Respondent: Counsel instructed by DAC Beachcroft LLP

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of harassment related to race contrary to section 26 Equality Act 2010 fails and is dismissed.

2. The complaint of direct race discrimination contrary to section 13 Equality Act 2010 fails and is dismissed.

3. The complaint of victimisation contrary to section 27 of the Equality Act 2010 fails and is dismissed.

4. The complaint of unfair dismissal contrary to the Employment Rights Act 1996 fails and is dismissed.

REASONS

Introduction

1. The claimant was born on 12 February 1985. He describes himself as a Black person from Africa.

2. The respondent, Shred-it Ltd, aka Stericycle, as the name suggests is an organisation whose business involves confidential waste disposal, including shredding, either on site or at a depot. It is a large organisation with branches in the United Kingdom and in different countries.

3. The claimant was dismissed on 28 April 2022 on the basis of conduct. This related to an accumulation of incidents. An ACAS certificate was issued on 17 June 2022. He then brought these proceedings. His claim, presented on 22nd June 2022, asserted he had been unfairly dismissed and he sought compensation only. He subsequently quantified this. He also complained of direct race discrimination, harassment related to race, and victimisation arising out of his employment.

4. A response to the unfair dismissal complaint was lodged on 2 August 2022. The response accepted the claimant was employed and his employment was terminated on 28 April 2022.This was said to be because of his conduct. The respondent denied discrimination. Attached to the form was a document entitled 'Grounds of Resistance' wherein the respondent gave details.

5. The respondent referred to the ACAS certificate of 17 June 2022 and submitted that any incidents before 17 March 2022 were out of time for section 123 of the Equality Act 2010.

6. It was said the claimant had not raised any grievance about a comment accusing him of being an undocumented immigrant.

7. The Grounds of Resistance says that the claimant's primary job role was to provide customer service over the telephone. It referred to two written warnings dated 23 July 2021 and 1 December 2021.

8. There was a case management hearing before Judge Sharkett by telephone on 9 September 2022. The claimant was directed to provide a schedule of his claimed financial loss. The parties were to disclose to each other relevant documents, to prepare a bundle for the hearing and to provide all relevant statements.

9. The following issues were identified:

   (i) Whether occurrences before 17 March 2022, being three months before the ACAS certificate, were out of time. If so, whether it is it just and equitable to extend time. This includes consideration of whether before that date, Mr Paul Kent had called the claimant an illegal immigrant.

(ii) Whether the respondent had shown the reason for dismissal.

(iii) Whether it was a potentially fair reason under section 98 Employment Rights Act 1996.

(iv) If so, applying the test of fairness in section 98(4), the issue was whether the respondent acted reasonably in all the circumstances. It was necessary to ask whether the respondent acted reasonably in treating that as a sufficient reason to dismiss the claimant.

(v) It would also be necessary to consider if Ms Leanne Elmore, Jan Whiting and Ian William had brought false allegations against the claimant in respect of an alleged touching incident. Generally, the misconduct would involve consideration of whether the respondent genuinely believed the claimant had committed misconduct.

(vi) The next issue was then whether there were reasonable grounds for that belief. This would require the respondent to have carried out a reasonable investigation, including following a reasonably fair procedure.

(vii) It is necessary for the respondent to show that dismissal was within the band of reasonable responses.

(viii) Regarding the claim of racial discrimination the Tribunal would have to consider whether the claimant had proven facts from which the Tribunal could conclude he was treated less favourably than someone of a different race. There being no direct comparator he must show he was treated worse than a hypothetical comparator, for instance, who was White. If so, the Tribunal must ask if the less favourable treatment was because of race.

The witnesses and documents

10. The hearing took place on the 17 and 18 April 2023, with the claimant providing his submissions on 20 April 2023.

11. The respondent called a number of witnesses who had provided written statements in advance for the hearing. We heard from Ms Leanne Elmore, a Customer Service Executive with the respondent and Ms McLaine,the claimant's team leader. Ms Jo O'Gara, Director of Financial Shared Services was called and finally, Mr Walker, Sales Director with the respondent.

12. The claimant gave oral evidence and did not call any witnesses. He had prepared a written statement which he adopted. He said English was not his first language, but he did not indicate any problems with English at the hearing.

13. We were supplied with documentation from the respondent in relation to the key stages. Their bundle runs to 175 pages. The claimant did not provide a bundle.

Findings of Fact

The employment background

14. The claimant began his employment on 23 June 2016. A document dated 14 April 2016 sets out his general terms and conditions. His job title was `client care associate'. There is a section on sickness absence which requires an employee to inform their manager of any absence and the reason within half an hour of the start of the working day of absence unless a medical certificate is provided. His place of work was the company's offices at Cross Street, Sale, Manchester. He was provided with a written copy of the respondent's disciplinary policy dated August 2018.

The warnings

15. On 23 July 2021 he was issued with a first written warning. This followed complaints made by a customer about how he dealt with them on the telephone. On 1 December 2021 he was issued with a final written warning, again following a customer complaint about him on the telephone. He was advised the warning would remain on his file for 12 months and would be taken into account in any subsequent disciplinary matters.

16. The document in relation to the first warning refers to a hearing held on 20 July 2021. The appellant attended alone, albeit he had the option of being accompanied. The investigation was carried out by a team leader, Mr Michael Brindley. It related to an allegation of misconduct in relation to his call handling. A customer had complained that he came across as rude.

17. He was advised on 23 July 2021 that the complaint had been upheld and would be recorded and remain on his file for 12 months. The appellant had a right of appeal which he chose not to exercise. The appellant accepted the decision and indicated that he would work with Ms Paula McLaine and any other team leader to avoid a repetition.

18. The next written warning relates to another customer complaint that he had been rude on the telephone. Again, the appellant was invited to a hearing. There he indicated that he has a tendency to speak quickly and that English was not his first language. He accepted there had been shortcomings in his performance and that he should have escalated the enquiries to other members of staff such as Ms Paula McLaine. Again, he had a right of appeal which he did not exercise.

The 30th of March 2022 incident with Mr Kent

19. There was an incident involving a work colleague, Mr Paul Kent. He said Mr Kent called him a racist. The claimant dates this as occurring on 1 April 2022 but the respondent's documentation records the incident as occurring on 30 March 2022, at around 8.00am. Given that the appellant is working from memory and the respondent has cited the date from a written record we will adopt the respondent's date of 30 March 2022. Nothing material turns on the date.

20. The incident began with a conversation with Mr Kent that morning around 8.00am. They both worked in an open plan office and other members of staff were present.

21. The claimant told Mr Kent that from the end of the month he would be responding to email enquiries. Previously, his job was to answer telephone calls from customers. Mr Kent appeared aggrieved at this. He said Mr Kent became very angry as the conversation developed, with reference being then made to earlier conversations. He then called the claimant a racist.

22. We find a comment along these lines was said but it has to be placed in context. It related to comments the claimant had made around April or May 2020 about Covid 19.Mr Kent stated the claimant said it had been made by White people. He did recall having a conversation with Mr Kent about covid and says this related to him relaying a Metro newspaper article rather than expressing his own views. The article attributed President Trump as saying Covid 19 came from China whereas China in response said it came from Europe. Questions of race and colour were introduced in the article.

23. He said that previously Mr Kent had called him an undocumented immigrant and that he, Mr Kent, had worked for immigration services in the past. The appellant indicated he was hurt at the time by these remarks and felt demeaned. Nevertheless, he did not complain about these comments and took them in part as general banter. We find in the course of their time together at work there were remarks along these lines.

24. The conversation of 30 March 2022 escalated. It was heard by other workers in the open plan office. The incident came to the attention of the respondent and there was an investigation.

The investigation into the incident with Mr Kent

25. At page 88 of the respondent's bundle there are notes from the respondent's investigation into the incident of 30 March 2022 with Mr Kent. Ms Paula McLaine was the note keeper. The notes were taken approximately three hours after the incident, with a statement signed the following day. We find the record to be accurate.

26. A Mr Martin Lee was interviewed, and he relayed how he arrived at work shortly after 8 AM. He said that Mr Kent was seated at his desk and the claimant was standing next to him. They were having a conversation, with the claimant speaking louder than Mr Kent. Mr Clark said he heard the claimant say to Mr Kent that he was being oversensitive. Mr Kent objected to this and several times told the claimant not to be saying that. Mr Lee said matters were becoming so heated that he told them to calm down but they both continued. He described the claimant's stance as possibly intimidating but not aggressive.

27. Mr Kent was then interviewed. He said he came to the office shortly before 8 AM. 5 or 10 minutes later he had a conversation with the claimant. At the outset Mr Kent indicated he did not want any complaint going further. He said the claimant went to his own desk and then shouted over to Mr Kent, referring to his new role doing emails. Mr Kent told him to stop telling him about this, whereupon the claimant said he was too sensitive. Mr Kent responded by saying he was not happy with some of the things the claimant had said, such as Covid being a White man's disease. He said the claimant repeated this whereupon Mr Kent told him to stop and to say sorry. Mr Kent said he did not want the claimant to lose his job but thought he should keep his opinions on such matters to himself. He was asked if he had called the claimant a

racist. Mr Kent said he did not call the claimant racist but had said that his comments were. Mr Kent said the remarks occurred two years earlier. The issue of an apology was raised and Mr Kent said he did not want to apologise for his beliefs and that he had not said anything offensive.

28. The claimant was then interviewed. He said he had arrived about 8.30am and had logged onto his phone. He said he spoke to Mr Kent, saying he had good news for him in that he is going to be doing emails. He said Mr Kent replied by asking why he should be happy about this. The claimant said that Mr Kent had complained in the past about him only doing telephone calls. He said that Mr Kent then referred to a conversation the previous year about Covid being a White man's disease. The claimant denied saying that but was relaying an article in the Metro newspaper about Black people not wanting immunisation. He said he asked Mr Kent why he had brought this up. Mr Kent then became angry, whereupon the claimant said he was only joking and that he was being oversensitive. He said that Mr Kent called him a racist because of what he has said about Covid. The claimant then left and went to his own desk.

Events subsequent to the incident with Mr Kent.

29. The claimant repeatedly said to staff he wanted Mr Kent to apologise for calling him a racist. He said he was feeling unwell because of the altercation. He said he felt emotionally damaged when Mr Kent refused to apologise. Subsequently, he went to his doctor and was given a sick line due to stress. The claimant was absent from work due to illness from the 31 March 2022 to 8 April 2022.We do accept the claimant was genuinely upset by the incident and harboured feelings of injustice.

30. There followed a series of episodes, with the appellant attending for work and seeking an apology and then leaving when one was not forthcoming. There were also meetings with his line manager, Ms Paula McClaine. She took the view he had raised his voice towards her and had been uncooperative.

The 13th of April 2022 meeting

31. He attended a meeting on 13 April 2022 with Ms Paula McLaine. He was advised of the outcome of the respondent's investigation into the 30 March 2022 incident with Mr Kent.

The 19th to the 21st of April 2022

32. On 19 April 2022 he was given a note of the meeting of 13 April 2022. He was advised that whilst a formal disciplinary process was not being instigated, a note would remain on his file about the incident of 30 March 2022. After receiving the note we find he presented as aggressive, raising his voice. He then left the premises without prior agreement.

33. An email from Ms McLaine dated 20 April 2022 records the claimant attended for work that day but told her he was not feeling well. He had concerns about the investigation and the outcome. He maintained he wanted an apology from

Mr Kent. She advised if he was not content with the investigation he should contact human resources.

34. The note records that she also spoke to the claimant about how he was behaving that morning by refusing to carry out his work and speaking openly in the office about his grievances, including going to other line managers. Ms McLaine told the appellant that what he was doing was unacceptable and informed him it could be the subject matter of a further investigation. He was advised if he went home he would not be paid but he nevertheless decided to leave.

35. He worked on 19, 20 and 21 April but continued to say to Ms McLaine that he was unable to work as he was feeling emotional. On the 20 and 21 of April 2022 he attended in the morning time and again presented as aggressive and left without prior approval.

36. The respondent then became aware of an allegation of inappropriate touching on 21 April 2022.When he returned to work he was advised a complaint by another employee, Ms Leanne Elmore, of inappropriate touching on 21 April 2022 . This was said to have occurred in the workplace kitchen and four people were present, the claimant, Ms Leanne Elmore, Ms Jan Whiting and Mr Ian William He was spoken to about the incident by his line manager, Ms Paula McClaine. He denied the allegation and suggested it was being made falsely by the other workers who were friendly towards Mr Kent. A further investigation took place.

37. Given these various incidents, namely, his behaviour and partial absences on the 19, 20 and 21 April 2022, and the complaint of inappropriate touching he was invited to an investigation meeting on 22 April 2022.

The investigation of 22nd April 2022

38. Page 116 of the respondent's bundle contains a note of the investigation meeting on Friday, 22 April 2022.We find the note accurately records what occurred. It was carried out by Ms. McLaine. Its remit was to investigate the events of the previous days and possible misconduct. The meeting was also to discuss how he had interacted with Ms. McLaine during the original investigation into the incident with Mr Kent.

39. Ms McLaine asked him why he had been demanding meetings and shouting on the office floor. He said he did not mean to be disrespectful and was sorry. He said he did not recall shouting but if he had he was sorry. He said he remained stressed about what had happened. She referred him to their meeting the previous day when he came across as aggressive. He accepted he raised his voice but said he apologised immediately. It was pointed out about another staff member, Ms Angela Brooks, raised her hand because he had been raising his voice. Again, he said he did not mean to raise his voice but if he had he was sorry.

40. She referred him to their meeting the previous day about the touching incident when she said to him he was coming across as aggressive. He accepted he raised his voice but said he apologised immediately. It was pointed out another staff member, Ms Angela Brooks, raised her hand because he had been raising his voice. Again, he said he did not mean to raise his voice but if he had he was sorry.

41. He was then asked about coming to work on three occasions and then leaving. He said he did not leave on purpose but felt mistreated. He said he wanted an apology from Paul Kent.

42. He was then asked about the touching complaint. He said the suggestion had been made up to get rid of him and to help Mr Paul Kent. He said if he had done wrong he would apologise. However, he said he could not remember touching her.

43. Mr Ian Williams was interviewed around 3.30pm that afternoon. He said the claimant came into the kitchen around 8:20 AM. He indicated that there were other staff members present, Ms Leanne Elmore and Ms Jan Whiting. The claimant began talking about a sexual relationship he said he was having with a teenager. Others in the room objected to this conversation. The claimant is then said to have put his hand on Ms Elmore's breast. When other staff remonstrated he desisted and the staff members left. Mr Williams added that he had known the claimant for a while and over the past few days his behaviour had been erratic.

44. Ms Jan Whiting was interviewed after Mr Williams. This was shortly after 4 PM that day. She said he had been acting unusually the day before. She referred to him mentioning a new girlfriend and then he placed his hand on Ms Elmore's breast. The claimant said he had been feeling stressed over the earlier incident with Mr Kent. Ms Elmore was questioned about the incident. She said when the claimant came into the kitchen he presented as loud and began talking about his girlfriend. He was asked not to continue on the subject but did not stop. He then touched her left breast and Ms Jan Whiting remonstrated with him. She also said for the past few days he had been acting out of character.

The investigation report

45. The respondent subsequently concluded there was a disciplinary case to answer. He was given a copy of the report completed by Ms McLaine, dated 22 April 2022. Ms McLaine had recommended formal action. Further to this, documents were forwarded to Ms Angela Brooks. She arranged a disciplinary hearing chaired by Ms Joanne O'Gara. She summarised the allegations as aggressive behaviour towards his team leader, Ms McLaine, his unauthorised absences on the 19, 20 and 21 April when he attended each morning and then left and the complaint of inappropriate touching.

The disciplinary hearing

46. A letter was sent to the claimant on 25 April 2002 inviting him to the disciplinary hearing following the outcome of the investigation by Ms McLaine on the Friday, 22 April 2022. The disciplinary hearing was to be heard by Ms O'Gara, with a note taker present. Ms O'Gara's job title is Director of Financial Shared Services. He was told of the allegations that have been identified. He was given the notes relating to the investigation as well as the statements from the three individuals concerned. He was also given a copy of the final written warning he had received in December 2021. He was given details of the respondent's disciplinary procedure and was advised he would have an opportunity to respond and present any evidence. He was advised that his actions may constitute gross misconduct for which the sanction could be summary dismissal. He was told he could be accompanied by a work

colleague or a representative. He was given a contact number if he had any queries. He attended the disciplinary hearing on 28 April 2022 This was held with Ms O'Gara, Following this his employment was terminated. Ms O'Gara was of the view that his recent behaviour justified dismissal for misconduct. She did not take into account the allegation of inappropriate touching as she was unable to make a finding on this.

47. At page 141 of the respondent's bundle is a summary of the disciplinary hearing of the 28 April 2022. The document records the introduction that was given and the procedure that would be followed. The allegations were identified as aggressive behaviour towards his team leader, Ms McLaine, authorised absences on the 19, 20 and 21 April when he attended work and then left. There was also the complaint of inappropriate touching. Each of the allegations was put to the claimant separately. It was said that he would shout across the floor demanding meetings and raising his voice towards her. There was reference to the incident with Mr Kent having been resolved in line with the company policy but that the claimant was not content with the outcome. There was reference to the allegation of inappropriate touching. It was also said that the witnesses have said his behaviour was not his normal behaviour.

48. The claimant said that he was very emotional and had not read the file. He referred to his relationship with Mr Paul Kent, saying he had worked for six years with him and tried to avoid him if possible. He said Mr Kent said he was afraid of him and he put this down to a time when he wore dreadlocks. He said he did not complain about the earlier comments made by Mr Kent as he wanted to maintain a good relationship. He referred to an occasion when he said Mr Kent called him an illegal immigrant and that he had worked at the Home Office. Again, he said he did not raise this with management and made light of it. He said in 2020 he had been working from home and when they returned Mr Kent again referred to him as an illegal immigrant. He said they liked to joke together. Mr Kent asked him why he did not do the email work. He then referred to telling Mr Kent he would be doing this, expecting him to be pleased. However, this was not the case. He said Mr Kent then referred to the alleged comment about coronavirus being made by White people and accused the claimant of being a racist. He was reminded that the disciplinary hearing was dealing with subsequent events and that the original incident with Mr Kent had been resolved on the company policy.

49. The claimant then said he had visited his doctor after the incident with Mr Kent and was off work for a week. He then returned but then left again. He said he was not in a good state of mind. He said he had spoken to Ms McLaine who told him he would not be paid if he left. He accepted he could have dealt with this better had he been calmer. Regarding the touching allegation he said this was false and made up by friends of Mr Kent. He wanted to see evidence to support the accusation. Ms O'Gara recorded that at the meeting with her the claimant became very animated and loud.

50. The disciplinary hearing then adjourned. It reconvened with Ms O'Gara concluding she had not found gross misconduct but that there had been misconduct. She went on to state that given the appellant was already on a final written warning the only option was dismissal. He was advised of his right of appeal.

51. A letter dated 3 May 2022 was sent to the claimant setting out in writing the outcome of the disciplinary hearing of 28 April 2022. It stated the allegations were aggressive behaviour towards Ms McLaine, unauthorised absences on the 19, 20 and 21 April 2022, attending work and then leaving and the complaint of inappropriate touching. The letter states that a number of his actions amounted to misconduct. He had accepted raising his voice to his team leader for which he later apologised. The complaint of aggression towards her was accepted. Similarly, unauthorised absences were found on the 19, 20 and 21 April 2002.

52. Ms O'Gara said she had not interviewed witnesses in relation to the inappropriate touching allegation and concluded she could not make a finding on this issue.

53. She commented there was no justifiable reason for his actions and that his behaviour during the disciplinary hearing suggested he was finding it difficult to keep control of his emotions. She says she considered all options and concluded the appropriate option was to terminate his employment because of his misconduct. This was effective from the date of the hearing, 28 April 2022. He was advised of his entitlement to pay in lieu of notice. He was also advised of his

The right of appeal.

54. On 7 May 2022 he indicated by email he wanted to exercise his right of appeal and repeated the various incidents. He referred to his meeting with Ms O'Gara and his view she had already predetermined matters.

55. He was invited to a hearing by a Mr Les Walker, to be held either on the 8th or 9th June 2022 at his workplace. The claimant indicated he did not want to return to his former workplace.

56. There is correspondence relating to attempts to arrange an appeal meeting. This included an email from Mr Les Walker, the sales director with the respondent, stating he had been asked to conduct the hearing. He was given a choice of alternative office venues in Milton Keynes or Birmingham and a selection of dates. The claimant had indicated as he was out of work he could not afford to travel to venues outside of Manchester. He asked for a hearing in Manchester but not on the respondent's premises. He was also advised the appeal hearing could be conducted virtually and that he was entitled to have someone with him. The respondent was not prepared to have the hearing recorded but there would be facilities for a note taker. which he declined on the basis it did not have a laptop. A decision was taken in his absence and he did not exercise the further right of appeal offered. There was an email from Ms Keeble to Mr Walker suggesting the claimant was being unreasonable in his responses to possible meetings. He was advised the hearing could take place over Teams

Submissions

57. We heard submissions from Counsel for the respondent. We were referred to the claims made which were out of time and urged not to admit them. It was submitted there was no evidence to indicate race played any part in the claimant's dismissal. No comparator was advanced. Reference was made to the various

incidents and the subsequent investigations, being submitted the respondent had demonstrated the reasons for the dismissal and that they had acted reasonably throughout including investigation. Dismissal was within the range of reasonable responses.

58. The claimant was given the following day to prepare his submissions. He prepared six pages of written submissions with the submitted. In summary he returned to the original issue with Mr Kent. He said that he had been the victim of racial discrimination and that individuals within the company were biased against him and made false allegations. He was critical of the investigation by Ms O'Gara and again suggested she was motivated by racial discrimination. Regarding his absences on the 19th, 20th and 21 April he submitted that he had been feeling unwell and had explained this to his manager. He submitted that she ignored his emotional feelings and how he was struggling.

The Law

Time limits

59. The time limit for an Equality Act claim is at section 123 of the Equality Act. It provides:

(1) …Proceedings … may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable …

60. The "just and equitable" extension was considered in British Coal Corporation –v- Keeble [1997] IRLR 336.By analogy the factors which appear in Section 33 of the Limitation Act 1980 were referred to but they were not exhaustive. Referring to the section 33 time limits Keeble guided:-

> "that section provides a broad discretion for the court to extend the limitation period… It requires the court to consider the prejudice which each party would suffer …and to have regard to all the circumstances and in particular,
>
> (a) the length of and reasons for the delay;
>
> (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
>
> (c) the extent to which the party sued had cooperated;
>
> (d) the promptness …once he or she knew of the facts giving rise to the cause of action;
>
> (e) the steps taken by the plaintiff to obtain appropriate professional advice.

Racial discrimination

61. The protected characteristic of race is defined by section 9(1) of the Equality Act 2010.It includes colour, nationality or ethnic origins.

62. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

(1) 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".

63. Section 39(2)(d) of the Equality Act 2010 prohibits discrimination against an employee by subjecting them to a detriment. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".

Harassment

64. Section 39(3) prohibits victimisation and section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint. Tribunals should have regard to the Code of Practice on Employment issued by the Equality and Human Rights Commission which came into force on 6th April 2011 ("the Code").

65. The definition of harassment appears in section 26 which so far as material reads as follows:

(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of:

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

66. In deciding whether conduct has the effect referred to … each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

Victimisation

67. Victimisation has a specific legal meaning defined by section 27:

> "A person (A) victimises another person (B) if A subjects B to a detriment because -
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act."

68. Each of the following is a protected act –

> (i) bringing proceedings under this Act;
>
> (ii) giving evidence or information in connection with proceedings under this Act;
>
> (iii) doing any other thing for the purposes of or in connection with this Act;
>
> (iv) making an allegation (whether or not express) that A or another person has contravened this Act.

69. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

70. This provision does not require any form of comparison. If it is shown that a protected act has taken place, and the claimant reasonably perceives himself to have been subjected to a detriment, it is essentially a question of the "reason why" the claimant is subjected to a detriment.

The burden of proof

71. The Equality Act 2010 provides for a shifting burden of proof. Section 136 provides as follows:

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

72. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Unfair dismissal

73. The unfair dismissal claim was brought under section 98 of the Employment Rights Act 1996.So far as relevant, it provides as follows:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this sub-section if it … relates to the conduct of the employee …
>
> (3) …
>
> (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

74. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

75. British Home Stores v Burchell [1980] ICR 303 considered fairness and highlighted three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? A fair investigation requires the employer to also follow a reasonably fair procedure. If the three parts of the Burchell test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

76. The Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was

fair and appropriate: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

Discussion and Conclusions

The out of time incidents

77. We do not see evidence of an ongoing course of conduct. Rather, there were isolated incidents between the claimant and Mr Kent. These came up several years earlier and came up in conversations about the prevalent Covid epidemic. These included the claimant relaying an article he read in the Metro newspaper and there was mutual reference by the appellant and Mr Kent about racial attitudes towards the pandemic and its origin. Both parties were particularly sensitive and took exception to some things that were said and harboured grievances. The claimant acknowledges he did not report these to management and would try, for appearances sake, to treat them as matters of banter.

78. We have not had the benefit of hearing from Mr Kent. Whilst they were work colleagues the evidence suggested some underlying and simmering tensions between the two men going back over several years. The evidence indicates that there had been occasions when, what might to others appear relatively minor matters, were stored up as grievances by each of these men. We accept the claimant's account that there were references in conversation from time to time about his race. The evidence does not indicate this was an ongoing difficulty which was known to his employers or which involved other employees.

79. The evidence suggests there was some ill will between the men in relation to their respective job duties. The claimant indicated that Mr Kent was resentful of the fact the claimant was not doing emails duties. He also appeared resentful of the fact he would now be doing this type of work. The information we have on this is limited but it does appear to have been something which rankled with the claimant. He did indicate that he did not raise any racial issue with his employer and tried to dismiss some comments as humorous. Nevertheless, we do acknowledge that he did feel hurt by certain things that were said in relation to his race.

80. Both men appear to have been particularly aggrieved by certain things that were said on isolated occasions which they stored up internally. The claimant has put much on Mr Kent calling him a racist. The evidence indicates to us this occurred but was an isolated occurrence which arose following a casual conversation about the Covid epidemic which was prevalent at the time. We accept that the appellant raised this with Mr Kent in relation to a newspaper article he had read whereupon Mr Kent accused him of being racist. The claimant did appear to be particularly aggrieved by this even though the evidence did not indicate it was something which was persisted in. In turn, Mr Kent appears to have been particularly aggrieved when the claimant said to him he was being unduly sensitive on the 30th of March 2022.

81. We found he gave no real explanation for the delay on his part in reporting this. We accept Mr Kent alluded to the claimant's race and mentioned immigration matters and his experiences n previous employments. We also accept when the Metro article was being discussed Mr Kent in describing the appellant as racist was referring to his comments about the article .

82. We refer to the EAT decision in Richmond Pharmacology v Dhaliwal [2009] ICR 724.Paragraph 22 states that:

> "…not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

83. It was our conclusion it would not be just or equitable to extend time for consideration of the claim to include the historical comments attributed to Mr Kent. The claimant did not feel sufficiently aggrieved to refer it to management at the time. If such matters were admitted it would cause the respondent considerable prejudice. There would be difficulties for the respondent coming to obtain evidence about things said a number of years ago which were not documented or reported. Even with goodwill, memories will be affected not only the claimant's recollection but also anyone else involved. We do accept that things were said which caused the claimant annoyance but we do not find there were said so frequently and were so wrong that they crossed the threshold which would justify their consideration further.

Racial discrimination

84. The claimant emphasised in his submissions racial discrimination, which he said permeated the entire employment situation, and the investigations and treatment he received.

85. We find the claimant was not treated less favourably because of race, consciously or subconsciously. The evidence did not shift the burden of proof to the respondent, but even if it had shifted the burden we would have concluded that the respondent had shown that the reason for the treatment was entirely due to the way the claimant was behaving. The allegations related to race and direct discrimination therefore fail. Accordingly, this allegation of direct discrimination fails.

86. The claimant said he was the only Black person on the floor. We saw no evidence to indicate that a person of a different race or ethnicity would have been treated any differently. It was our conclusion that the fact the claimant

was a Black man from Africa was not a material factor in the respondent's actions.

87. We can find no evidence that can form a basis for such complaints. In this regard we are in agreement with the submission of the respondent's Counsel. We see nothing to indicate in any way that the respondent or indeed any of the witnesses called discriminated.

Harassment and victimisation

88. As with the racial discrimination claim there was no evidence to suggest harassment or victimisation. We were repeatedly impressed by statements of his various work colleagues about not wanting to get him into trouble. This was said for instance by Mr Kent and then later by Ms Elmore. We see nothing in the investigations, including the emails between the parties to suggest any prejudice.

The unfair dismissal claim

89. We accept that the appellant was under stress at the time of the incidents leading up to his dismissal. His work colleagues had said he was not his normal self. Overall, the impression was that he was a popular member of staff. However, there was reference at the time to him presenting as loud and agitated. Beyond the short medical certificate, we have no medical evidence to say more of any underlying issues.

90. We were impressed by the witnesses called on behalf of the respondent. We did not detect any sign of vindictiveness on their part. We found the evidence they gave could be relied on. The impression given from their evidence was that the claimant had been acting out of character and they did not want to get him into trouble. We found they gave their evidence in a straightforward and helpful way which was unbiased. Although it was not given as a reason for dismissal or completeness we would add there was nothing to suggest the allegation of improper touching was fabricated out of sympathy for Mr Kent as the claimant suggested.

91. We were also impressed by the respondent's record keeping and the procedures that were followed. The procedures were fair and explained to the claimant what the issues were, what would take place and what he could do. We find that the notes were prepared in a timely manner and can be relied upon.

92. We find that the respondent has established a potentially fair reason, namely conduct. We have set out earlier the procedures the respondent followed. We find there was a proper investigation with which the appellant was engaged. Thereafter, there was an appropriate disciplinary procedure and again he took part in this. He was advised of the allegations and his right to be accompanied. He was given adequate details. Thereafter, he was told of his rights of appeal.

93. It is important to be clear about the reasons behind the claimant's dismissal. These are set out in the letter of 3 May 2022 of the outcome of the

disciplinary hearing of 28 April 2022. They related to aggressive behaviour towards Ms McLaine, unauthorised absences on the 19, 20 and 21 April 2022, attending work and then leaving. He was disciplined for misconduct, not for gross misconduct. It is of note that the sanction did not relate to the altercation with Mr Kent nor the allegation of inappropriate touching.

94. His conduct in relation to the events before his dismissal had to be viewed in the context of someone under a final warning. In Airbus UK Ltd v Webb [2008] ICR 561 the Court of Appeal recognised that when considering mitigating factors an employer could fairly distinguish between those employees with clean records and those with warnings, including expired warnings. Mummery LJ said at paragraph 47:

"The legislation does not single out any particular circumstance as necessarily determinative of the questions of reasonableness, equity, merits or fairness."

95. We find that the evidence indicates a nuanced approach to the various complaints. Ms O'Gara says she considered all options in terms of sanction and concluded the only one available was to terminate his employment because of his misconduct. We find Ms O'Gara genuinely concluded, in good faith, that his recent behaviour amounted to misconduct and the most appropriate sanction was dismissal. This decision was taken in light of the recent events and against the background of his two disciplinary warnings. We are satisfied that the respondent had a genuine appeal procedure and intended to follow this, but the claimant was not willing to engage. We find that the respondent did try to accommodate his various objections and our conclusion was that his own behaviour in not engaging was unreasonable.

96. We were satisfied that that the decision to dismiss the claimant represented a genuine good faith conclusion based on the evidence gathered during the investigation process. We also find that that there was a reasonable investigation carried out by the respondent and that the process was fair. The outcome, namely dismissal, was within the band of reasonable responses.

97. We do not need to reach a finding in relation to the alleged improper touching as this was not a factor in the respondent's decision to dismiss. In our view this was indicative of the fair approach taken by the respondent.

98. We find a proper process was followed by the respondent including a right of appeal which a claimant chose not to exercise. He was given a number of options for a meeting. We find the respondent acted reasonably in considering the claimant's request for alternative forums and did what they could accommodate him.

Decision

99. It is unanimous decision of this Tribunal that the claimant's claims are not well-founded and fail. The question of remedy does not arise, so no award is appropriate.

Employment Judge Farrelly

Date:11th September 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

20 September 2023

FOR THE TRIBUNAL OFFICE

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