



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4120854/2018 & 2206548/2018 Hearing at Edinburgh on 21, 22 and
23 May 2019

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Employment Judge M A Macleod
Tribunal Member S Cardownie
Tribunal Member P Kelman

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(1) Aleksandr Trifonov

Claimants
In Person

(2) Kristina Karpes

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Amazon UK Services Limited

Respondent
Represented by
Mr L Harris
Barrister

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous Judgment of the Employment Tribunal is that the claimants' claims
of unfair dismissal and discrimination on the grounds of race all fail, and are
therefore dismissed.

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REASONS

Introduction

1. In this case, two claimants have presented claims to the Employment Tribunal in which they have complained of unfair dismissal by the respondent, together with discrimination on the grounds of race.
2. The claimants not only worked together for the respondent until their
5 respective dismissals, but live together as husband and wife.
3. The respondent submitted ET3 response forms in relation to these claims, resisting all claims made.
4. A hearing was fixed to take place on the merits of the cases, now combined,
10 on 21 May 2019 and the 3 succeeding days. As it turned out, the hearing was concluded on 23 May 2019.
5. The claimants attended and appeared on their own account, with the assistance of an interpreter. The respondent was represented by Mr Harris, Barrister.
6. A joint bundle of productions was placed before the Tribunal at the outset of
15 the hearing, which was relied upon by both parties. Additional documents were introduced during the hearing, without objection.
7. The respondent called as witnesses Bryan Dougan, Area Manager, Fife and Laura Elizabeth Sugden, Operations Manager, Birmingham.
8. The claimants each gave evidence on their own behalf, and also called
20 Valerij Voronovskij as a witness.
9. One matter which arose at the start of the hearing was the spelling of Mr Trifonov's surname, which was recorded in the ET1 as "Trifinov", but which he assured the Tribunal was properly designed as "Trifonov". Accordingly, the instance in this case is amended to reflect his correct name.
- 25 10. During the course of the hearing, it became apparent that the claimants had not come prepared to give evidence or provide supportive documentation in relation to the mitigation of losses, nor indeed demonstrate their losses. As a result, with the consent of all parties, the Tribunal concluded that it was appropriate to restrict this hearing to the issue of liability only. A separate

remedy hearing would therefore be convened in the event that it was necessary.

11. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

5 **Findings in Fact**

Aleksandr Trifonov

12. Mr Trifonov was born on 7 August 1975, and commenced employment with the respondent on 17 April 2016 as an FC Associate. He was provided with a statement of terms and conditions of employment on appointment (61ff).

10 13. His role involved working shifts at the respondent's Fife warehouse, moving goods for delivery.

14. In October 2017, Mr Trifonov suffered a traumatic pneumothorax (often referred to as a "punctured lung") as a result of having fractured a rib. He was signed off as unfit to work by his GP, who also noted that he was unfit to fly (80).
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15. On 18 May 2018, Mr Trifonov went off sick, having been signed unfit for work on that day by his GP (84). The reason given was "Previous rib fractures, recent injury after heavy lifting". He submitted a further note from his GP certifying that he continued to be unfit for work, dated 18 June 2018, to cover the period to 25 June 2018 (89). The reason for his absence was the same as that given in his previous note.
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16. On 19 June 2018, Mr Trifonov was asked to attend an "LTS [Long Term Sickness] Informal Health Review" meeting with his line manager, Daniel Bell, in the presence of Simona Ramauskaite, of Human Resources, who took notes. Mr Trifonov was recorded as having declined to have a companion with him. Notes were taken by Ms Ramauskaite (90ff) which are an accurate record of the discussions which took place in that meeting.
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17. There is no note in that record of Mr Trifonov having requested an interpreter at the start of the meeting, nor at any stage thereafter. At one point, Mr Bell

(91) spoke about looking at the paperwork (related to his absence), and Mr Trifonov is recorded as saying *“Simona – if I am not mistaken you speak Russian.”* She replied: *“Not very well”*.

18. Following an adjournment, Mr Bell resumed his questioning of Mr Trifonov thus:

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“DB: So few more questions. So you have been off since May 14th until the 25th of June you are signed off. What have you been doing since then? Between that time and now what have you been doing?”

AT: Just at home, sitting home.

10 *DB: The whole time yes?*

AT: Yes, walking my dog. Sitting and because I want to understand what they tell me on Friday and how it is inside and the lung damage as 5 mm went into my lungs. I can't fly as well. I can't dive as I do diving 40 meters deep.

15 *DB: So you can't fly, dive and go to the gym.*

AT: Yes. I can do sauna...”

19. When Mr Bell asked Mr Trifonov a series of questions ending with a question about how he broke his ribs, it is noted that he did not understand the question.

20 20. Mr Trifonov signed the notes at the end of the meeting once they had been transcribed, on 19 June 2018.

21. Following that meeting, Graeme Lamond, Loss Prevention Specialist, wrote to Mr Trifonov on 25 June 2018 (95) to notify him of a disciplinary investigation, into the following allegation:

25 *“It is alleged that during the period of 14 May 2018 to date you may have fraudulently claimed company sick pay.*

This is a serious breach of the UK Disciplinary Policy specifically the following subsection:

- *Wilful dishonesty or theft from Amazon, its employees and/or its customers*
- 5 • *Acts of dishonesty such as claiming Company Sick Pay for non-genuine illness, theft of money or property or any dishonest conduct in connection with the performance of your duties.”*

22. He was invited to attend an investigatory meeting with Mr Lamond on 26 June 2018 in the HR Offices. A copy of the disciplinary policy was said to have been enclosed with that letter, but in fact it was not.

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23. The investigatory meeting took place on 26 June 2018 as scheduled. Mr Lamond chaired the meeting, with Carole Hollington in attendance as HR Adviser, and Ms Ramanauskaite present again as note taker. Notes were taken of the meeting (97) at the outset of which it is recorded that Mr Trifonov declined the opportunity to have a companion present with him at the meeting.

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24. Mr Lamond opened the discussion by asking Mr Trifonov about the period between 18 May and 25 June. Mr Trifonov said that it had been “my holiday time”. He went on to describe that following his return to work (after he had broken ribs the previous autumn) he had been looking for lighter duties to perform as he remained in pain.

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25. The notes record that the discussion moved to the following exchange (99):

“GL: Last month which was May you said it was very sore, were you in the house and rested and did you go on any holiday? When was the last time you have went on holiday to for example Spain etc.

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AT: I went to see my friends and I have been home.

GL: Have you been on holiday?

AT: It is my holiday why must I say?

GL: All I am asking in the last couple of months.

AT: I was sitting at home sometimes.

GL: Home as in Scotland?

AT: Yes.

5 *GL: So you were in Scotland all of May?*

AT: Sitting at home.

10 *GL: Aleksandr I am going to show you some photos and it may be very serious and I want you to be honest with me. So on the 27th of May and 26th of May it appears that you have been tagged in post uploaded in Finland. It shows that you have travelled to Finland during period of sickness.*

AT: This is an old picture.

GL: So this photo here is in Stirling. This other photo was uploaded on 27th of May it is a geo tag in Finland Helsinki.

15 *AT: You want to comment on my pictures? This is an old picture.*

GL: When did you go to Finland?

AT: Hmm.. 2 years ago in August or September.

GL: So couple years ago.

AT: I have pictures on my phone and flash card.

20 *GL: So you went in August 2016?*

*AT: May? *Looks at photo evidence* this is my holiday or not?*

CH: Were you in Finland in May 2018?

AT: No.

CH: How do you explain that picture?

AT: it is an old picture.

GL: When were these taken? Roughly.

AT: I think now June I can't tell exactly.

5 GL: When was the last time you went on plane, air plane or travelled to a foreign country?

AT: Been on my holiday we have had a big meeting, dive meeting, in Cyprus...

CH: So you have planned annual leave?

10 AT: Yes, to go to Cyprus.

GL: So you went to Cyprus and it was not that trip that you have went to Finland?

15 AT: No, no, it was an old picture and it has wrong day 27th of May? 2 years ago we went to Finland. I don't know where you take this from. 1-2 weeks ago I put this picture in safari one of the children asked can you show me monkey and I said yes, yes, and it was inside here in Stirling."

26. During the course of this meeting, Mr Trifonov did not seek the assistance of an interpreter, nor did he suggest that he was unable to understand what was being put to him.

20 27. Mr Lamond prepared an investigation report (109ff) dated 29 June 2018, in which he stated his belief that Mr Trifonov travelled to Finland during the period of absence in question and fraudulently claimed company sick pay. He therefore considered that there was a case to answer for Mr Trifonov in relation to the following allegations:

25 "1. Wilful dishonesty or theft from Amazon, its employees and/or its customers.

2. Acts of dishonesty such as claiming Company Sick Pay for non-genuine illness, theft of money or property or any dishonest conduct in connection with the performance of your duties.”

5 28. He recommended that a disciplinary hearing should be convened to hear these allegations, without the claimant being suspended.

29. On 3 July 2018, Bryan Dougan, Area Manager, wrote to Mr Trifonov (111) to invite him to a disciplinary hearing on 4 July 2018 to answer these allegations. He confirmed that Mr Trifonov had the right to be accompanied at the meeting, and that dismissal may be the outcome of the hearing.

10 30. The disciplinary hearing took place on 4 July 2018. Mr Dougan chaired the hearing, and he was accompanied by Siobhan Stawlarskia, Human Resources Advisor, who took notes (113ff). Mr Trifonov declined the opportunity to be represented or accompanied.

15 31. Mr Dougan asked Mr Trifonov if he understood why he was there, to which he replied that he did.

32. He then explained that the disciplinary hearing related to the allegations of wilful dishonesty or theft from the company and that he may have fraudulently claimed company sick pay. When asked if he understood this, he replied “No”. Mr Dougan asked Mr Trifonov if he would like him to explain, to which he replied “I don’t know”.

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33. There was then recorded the following exchange between Mr Dougan and Mr Trifonov:

“BD: You and Kristina both went off sick at the same time on the same day 14 May 2018?”

25 *AT: Yes.*

BD: Is this a coincidence?

AT: What’s wrong with sickness?

BD: What were you sick with?

AT: Broken ribs, remember from accident.

BD: You still have broken ribs from December?

AT: No I just sick you know it hurts.

5 *BD: Ok there are pictures of you on Facebook in another country while claiming company sick pay.*

AT: You know that is illegal my lawyer said.

BD: Do you have evidence to support that you were not in Helsinki?

AT: I don't remember.

10 *BD: You don't remember if you were in Helsinki or if you had any evidence to say otherwise?*

AT: I can't comment, why are we talking about my private life?

BD: I am not, I am trying to gather the facts and see if you have any evidence to support that you were in Scotland on 25th and 26th May.

15 *AT: Next week I will show you.*

BD: No, you have had enough time to provide evidence, you were asked at your investigation meeting and you have yet to do so.

BD: Show me the evidence.

AT: I will show you after (Aleksandr laughs).

20 *BD: Do you understand how serious this is?*

AT: Why is it serious?

BD: There is an allegation that you have been claiming company sick pay fraudulently...

BD: Where is the proof?

AT: I don't have it – I have been home and watch TV. What are the rules , who says I can't fly? If I am sick what is stopping me from flying?

5 *BD: Do you understand how this looks? You have been pictured on Facebook abroad whilst claiming company sick pay.*

AT: I disagree.

BD: What with?

AT: My previous life you can't use, I speak with lawyer and where did you get that from?

10 *BD: it was anonymous..."*

34. Following the disciplinary hearing, Mr Dougan considered the evidence before him, and issued his decision letter (116) to Mr Trifonov by hand on 5 July 2018. Mr Trifonov was present on the premises at the time, and accordingly he asked him to come to his office in order to give him the letter. 15 When he arrived, Mr Trifonov asked for an interpreter to assist him with the translation of the letter. Mr Dougan expressed surprise at this, noting that he had not previously asked for an interpreter, but was able to secure the attendance of a Russian-speaking associate quickly. The letter was therefore translated to Mr Trifonov in full. When that was done, Mr Trifonov told 20 Mr Dougan that he would be hearing from a lawyer. He did not say that he had not meant what was recorded as his position in the letter, nor that there had been any misunderstanding.

35. Mr Dougan concluded, in his letter, that:

25 *"In summary, on 14 May 2018, both you and your partner went on sick leave from the company. You returned to work on 25 June, 2018 having exhausted your company sick pay. You provided Fit Notes to cover this period of absence. On 26/27 May 2018 a photograph was uploaded to your Facebook page with the geotag of Helsinki.*

You denied that you were in Helsinki at that time. You have stated that you were at home unwell with broken ribs. You were unable to provide any evidence to contradict my belief that you were not in Scotland, and were in Finland.

5 *I gave you a second opportunity to provide me with evidence that you were in Scotland, you have failed to do so. By evidence I meant examples of everyday living in Scotland directly connected to you, for example evidence of shopping, buying groceries, petrol or transportation for the period in question.*

10 *In the absence of any such evidence from you, I have reasonable belief that you were in Finland whilst claiming company and statutory sick pay. It is my understanding that it would not be possible to have the geotag unless you were in that location.*

15 *I also find it unusual that both you and your partner were absent from work for almost exactly the same period of time and I do not accept that this was a coincidence.”*

36. Mr Dougan confirmed that he had decided to uphold the allegations against Mr Trifinov, and that his decision was to dismiss him summarily.

20 37. Mr Trifinov was upset at being dismissed, and therefore submitted an email to Bridget Cameron, as he had been advised in the letter of dismissal, setting out his appeal against dismissal (118) on 6 July. He said:

“On the 5th July 2018 I was informed by Senior HR Manager that I was being dismissed by reason of dishonesty.

I would like to appeal against this decision.

25 *I wish the following information to be taken into account.*

I am appealing against my dismissal from Amazon. I disagree with this decision because I have been legally approved by my GP to be on sick line. I have read and understood the Amazon disciplinary procedures, however I have not noticed anything about leaving the country while on a sick pay.

Action taken against me is unfair and against the law as I have provided all required documents to be on sick pay.”

38. The appeal hearing was chaired by Laura Sugden, Operations Manager, and took place on 17 July 2018. She was assisted by Lesley Warder, who took notes of the appeal hearing (121ff). Mr Trifonov attended on his own but at the outset asked if his wife – Ms Karpes – could be his companion. Ms Sugden refused this request on the basis that she was involved in the case, and had her own appeal against dismissal.

39. When advised of this, Mr Trifonov said *“Would like my wife but another Russian speaker if I get lost.”* Ms Sugden responded that *“If we need someone we can get someone for you.”*

40. Mr Trifonov indicated that he was content to proceed, and at no stage during the appeal hearing did he repeat his request for an interpreter, nor show any sign that he did not understand what was being said.

41. He provided to Ms Sugden copies of bank statements for the period from 28 April to 26 June (103 to 108). The statements are from Barclays Bank, in respect of the account of Mr Trifonov. The following entries were brought to the attention of Ms Sugden:

- 1 May 2018 – Cash withdrawal on 30 April, at “Okeania Cyprus”;
- 30 May 2018 – Card Payment to “Lidl Espoo Iso Orne Finland”;
- 1 June 2018 – Card Payment to “Nordic Kitchen Finland”.

42. Ms Sugden read these latter entries as demonstrating that Mr Trifonov was in Finland at the end of May and beginning of June, notwithstanding his previous statements that he had been in Scotland throughout. She raised this with him in the appeal hearing:

“LS: Bank statements from May until June – you say you did not receive company sick pay when you were off. Normal pay is £410 per week – need

to double check pay slips – further clarified that it was sick pay but without the night allowance.

AT: Doctors line are in line – they are not fake.

5 *LS: No we know that – allegation is you were on holiday and claiming sick pay.*

AT: It was not a holiday just a normal visit.

LS: Were you in Finland when you were off sick from Amazon

AT: It was a weekend day.

LS: Were you in Finland when you were off sick from work.

10 *AT: No – whole time have been here.*

LS: Have you been in Finland between 18 May and 18 June? It shows on your bank statement you were in Helsinki.

AT: Yes.

[Following an adjournment, the questioning continued.]

15 *LS: In your disciplinary with Bryan you said you were not in Helsinki and you were at home unwell with broken ribs. Why say that when you have just proved you were in Helsinki?*

AT: Different reasons.

LS: What reasons?

20 *AT: I don't understand why.*

LS: What reasons for changing your mind – in the meeting with Bryan you said you did not go to Finland.

AT: Bryan asked if I had been holiday and used sick pay. You be in different country. Did you see difference – holiday or visit? It was a family visit to visit parent in law...”

43. Following the appeal hearing, Ms Sugden issued her decision by letter dated
5 22 July 2018 (126). She made the following findings:

- *“In your disciplinary hearing you denied that you were in Helsinki, Finland during the time you were receiving company sick pay (14th May – 25th June 2018). Bryan Dougan (Disciplinary Manager) asked you to provide evidence that you were in Scotland and you did not
10 provide satisfactory evidence at the time.*

- *In appeal hearing you provided a bank statement that showed you were in Helsinki, Finland during the dates listed above. Despite in both your investigation meeting and disciplinary meeting stating you were not abroad whilst receiving company sick pay, in the appeal
15 meeting you stated you were in fact visiting your mother in law in Finland and your bank statements you provided validated this.*

- *This therefore constitutes a serious breach of Amazon’s disciplinary policy, specifically ‘Acts of dishonesty such as claiming Company Sick Pay for non-genuine illness’.”*

20 44. Ms Sugden therefore decided to uphold the decision to dismiss Mr Trifonov.

Kristina Karpes

45. Ms Karpes, whose date of birth is 10 October 1980, commenced employment with the respondent on 14 October 2014 as an Associate in their Dunfermline warehouse.

25 46. She commenced a period of sickness absence from work on 14 May 2018 due to a back injury. A medical certificate was produced (129) confirming her unfitness for work from 21 May 2018 until 4 June 2018 due to that back injury.

47. She returned to work on 14 June 2018, and was required to attend an “LTS Informal Health Review” with Graeme Milne, Operations Manager, in the presence of Simona Ramanauskaite, who took notes of the meeting (135ff).

48. Ms Karpes declined the opportunity to be represented at the meeting.

5 49. Mr Milne opened the meeting by explaining why he had to chair it, rather than Mr Bell, and he noted:

10 *“You were basically on holiday until 2nd May and came back on Thursday the 3rd of May and then you been working Monday the 7th and 8th and you were off sick on Wednesday the 9th and came back on Thursday the 10th and then went off sick on 14th of May until now which is your first day back. Do you remember the reason why you were off sick on 9th of May?”*

50. Ms Karpes replied that she did not remember. Mr Milne repeated the question, to which she responded that it was *“...maybe something at home, I don’t remember it was a month ago.”*

15 51. When asked what the doctor had advised, she said that *“I sit at home and go swimming and drink tablets and sit and he said to stay at home. He said if I start the same always stand this will feel very bad and that I will need to have an operation and health is first for me.”*

20 52. Following this meeting, Ms Karpes was invited by Mr Lamond to a disciplinary investigation hearing on 26 June 2018 (143). The allegation was that *“It is alleged that during the period of 14 May 2018 and 13 June 2018 you may have fraudulently claimed company sick pay”*.

25 53. Ms Karpes attended the hearing, again declining representation. Mr Lamond opened the meeting by explaining the respective roles played by individuals there, and then asked questions about her absence.

54. He asked Ms Karpes if she had travelled a great distance (during her period of sickness absence), to which she replied no. He put to her that she had stayed local and not travelled, which she agreed. Following an adjournment, the following exchange is noted:

“GL: Thanks for waiting. Just to clarify you have had very painful back and you managed to go swimming but you said you have stayed local and said you did not travel.

KK: No I couldn't.

5 *GL: Having said that I want to show you some pictures from Facebook and it is tagged in Finland when you were off sick.*

KK: No. These pictures were when I was on holiday before sick. It was till 2nd of May it was holiday.

10 *GL: This is put after it is tagged in there and when you tag it in it is reasonable to believe that you have travelled during the period of sickness when you were covered by a fit note.*

15 *KK: I didn't travel, I travelled since I was on holiday for 10 days and I was with children and they were in school when I was off sick. I can put those photos in new year if I want to. It is my Facebook and my life, I have been on holiday...”*

55. Mr Lamond moved to ask Ms Karpes about photographs apparently showing that she had had a family trip to the Blair Drummond Safari park. When it was put to her that she was not fit for work but that she was able to go to the safari park, she said: *“You can stay in car when in the park and work is work. These pictures are from holiday because I understand I can't travel to another country when on sick.”*

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56. The following exchange is noted:

“GL: You do understand these photos and what they could potentially mean?

25 *KK: I had holiday, 4 days in Cyprus and 4 days in Finland.*

GL: But during absence?

KK: No, it was my holiday. For dual tag on Facebook if I was not in country how did I go to my GP for my fit notes?"

57. Mr Lamond raised the question of whether the claimant would have used her payment card to pay for items during the days in question, and if so, whether she could provide to him evidence to demonstrate that she was in fact in Scotland on the relevant dates.

58. Following that meeting, Mr Lamond produced his report (150ff).

59. He recommended that the allegation proceed to a disciplinary hearing, without suspension. He observed:

10 *"...Upon investigation, it appeared as if KK had travelled to Helsinki, Finland whilst claiming the resulting company sick pay. Facebook images, provided to Amazon by an anonymous individual, clearly show KK in Finland. Further to this, there was geo-tags attached to the images specifying the locations and dates which coincide with the period of absence. After reviewing KK's MyTime, I was not able to identify any requests/refusals for annual leave during this period. It was also noted that KK had a negative balance of 32.46 hours at the time of review. KK was invited to an investigatory meeting on Tuesday 26th June 2018 and asked questions related to my suspicions. KK stated that the pictures were uploaded three weeks after being taken, whilst at home. KK also stated that she had travelled to Cyprus with Alexandr Trifonov (AT) for four days, immediately followed by four days in Finland in April 2018 where the pictures were taken. This information was contradicted during an Investigation meeting with AT which was held immediately after KK's meeting.*

25 *During the interview, KK was asked to explain why images of herself and her partner Alexandr Trifonov (AT) had been uploaded to Facebook during the period of her absence. KK was unable to sufficiently explain why the geo-tags attached to the images suggested that she was in Finland on Saturday 26th May 2018 and Sunday 27th May 2018. KK stated that these images were taken in April 2018, however, I am not satisfied that this is the case.*

KK was asked to provide evidence that she was in Scotland on Saturday 26th May 2018 and Sunday 27th May 2018 but has yet to provide anything to support this.

5 *After reviewing the images (with geo-tags) the information received during AT's investigation meeting and the negative holiday balance held by KK I believe that KK travelled to Finland during the period of absence in question and fraudulently claimed company sick pay."*

60. Ms Karpes was invited to a disciplinary hearing on 4 July 2018, by letter dated 3 July 2018 (152). She was advised of her right to be accompanied to
10 the hearing, and also of the possibility that the outcome may be dismissal.

61. The disciplinary hearing took place on 4 July 2018, chaired by Bryan Dougan, Area Manager, who was accompanied by Siobhan Stawlarskia, HR Advisor, who took notes of the meeting (154ff). Ms Karpes was not accompanied, having declined the opportunity to have someone with her.

15 62. At the outset of the meeting, Ms Karpes raised the issue that her Facebook photographs represented her private life and should not have been used by the respondent in the disciplinary process. Mr Dougan disagreed with this and proceeded with the hearing.

63. After Mr Dougan some questions of Ms Karpes about her sickness, the
20 questions turned to the allegation:

"BD: The allegation contains that its [the photograph] uploaded from Helsinki.

KK: I not been, this is my old pictures.

*BD: Alexandr was spoken with and he said that you were on holiday before
25 you were sick and were in Finland.*

KK: Ha ha he doesn't understand the question.

BD: Ok.

KK: My mother did the photograph, I will try and speak with her.

BD: The Geo tag suggest that these were uploaded in Finland.

KK: No.

BD: What can you provide me with that would suggest otherwise?

5 *KK: I don't know, what do you want from me?*

BD: If you read your investigation report, Graeme has asked you to submit evidence to suggest that you were in Scotland specifically on 26th May and 27th May but have failed to submit any to date. What information could you provide to me?

10 *KK: I don't know, two days I been in Finland.*

BD: Can you provide me with your airline stubs for when you were there?

KK: I don't have them.

BD: Can you provide me with any bank statements but remove personal detail? There would be transactions on it for these dates.

15 *KK: My lawyer says it is illegal.*

BD: The matter if you need to prove you were in Scotland.

KK: I will bring you evidence.

BD: You should have submitted this before when requested.

KK: I will give you next week.

20 *BD: No Kristina I am not waiting until next week for you to provide evidence, you were asked to provide this last week but have not done so. If this were me, I would have provided it before now. Please provide this evidence via email tomorrow or present me with a print out tomorrow..."*

64. On the following day, Ms Karpes did submit further information by email (156A). It was a list of dates and company names, without any context or further information; together with an extract from a bank statement which did not disclose the name of the account holder and had a number of redactions made on it.

65. Mr Dougan considered all the information provided to him, and issued a letter of outcome on 5 July 2018, which, though said to have been delivered by hand, was in fact posted to Ms Karpes (157).

66. He set out his decision as follows:

10 *"In summary, on 14 May 2018, both you and your partner went on sick leave from the company. You returned to work on 13 June 2018 having exhausted your company sick pay. You provided Fit Notes to cover this period of absence. On 26/27 May 2018 a photograph was uploaded to your Facebook page with the geotag of Helsinki.*

15 *You denied that you were in Helsinki at that time. You have stated that you were at home unwell with a sore back. You said that your mother took the photograph and that you would speak to her. You were unable to provide any evidence to contradict my belief that you were not in Scotland, and were in Finland.*

20 *I gave you a second opportunity to provide me with evidence that you were in Scotland, you have failed to do so. By evidence I meant examples of everyday living in Scotland directly connected to you, for example evidence of shopping, buying groceries, petrol or transportation for the period in question.*

25 *In the absence of any such evidence from you, I have reasonable belief that you were in Finland whilst claiming company and statutory sick pay. It is my understanding that it would not be possible to have that geotag unless you were in that location.*

I also find it unusual that both you and your partner were absent from work for almost exactly the same period of time and I do not accept that this was a coincidence.

5 *Having considered the evidence carefully, I have decided to uphold the allegation against you.*

Having concluded that allegations should be upheld against you, I considered the appropriate action and sanction.

Having considered the matter carefully, I have decided to summarily dismiss you.”

10 67. Ms Karpes was given the opportunity to appeal against the decision. She did so by email dated 10 July 2018, and she said in that email (159) that she wished the following information to be taken into account:

15 *“I am appealing against my dismissal from Amazon. I disagree with this decision because I have been legally approved by my GP to be on sick line. As you told me that you do not believe that I was sick, automatically you putting doubtful qualification of my GP. I have read and understood the Amazon disciplinary procedures, however I have not noticed anything about leaving country while on a sick pay. Action taken against me is unfair and against the law as I have provided all required documents to be on a sick pay.”*

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68. An appeal hearing was fixed to take place on 17 July 2018, chaired by Laura Sugden, who was accompanied by Lesley Warder, taking notes (162ff). Ms Karpes was not accompanied, and confirmed at the outset that she was happy to proceed on her own.

25 69. Ms Sugden asked Ms Karpes if she had with her any evidence which had not been seen before. Ms Karpes handed over bank statements (237ff), in which a number of entries showed that she had used her bank debit card to make payments in Finland on 28, 29 and 30 May 2018. The following exchange is recorded:

“LS: It shows you are in Finland on the dates you were claiming company sick pay. Was it a holiday?”

KK: It was not a holiday it was to see my mum. It was unpaid for 3 days.

LS: Yes.

5 *KK: It was not paid sick pay.*

LS: Point Brian made is you stated you had company sick pay and said you had a sore back whether that was to visit or holiday. In your reviews and health reviews you said you were not away and at home. But if you are ill you still travelled to a foreign country and you stated you were resting at home....

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LS: Main thing we want to discuss is you couldn't travel and yet you went to Finland.

KK: I wasn't working at this time.

LS: You can't claim sick pay and be on holiday.

15 *KK: What can't I do now – don't pay me – take one month unpaid – I want to take holiday.”*

70. Ms Sugden considered the case and issued a letter of outcome on 22 July 2018 to Ms Karpes (166). She concluded that having denied that she was in Finland during the time when she was receiving company sick pay, she provided bank statements to the appeal hearing to show that she was in fact visiting her parents in Finland at that time. She found that this constituted a serious breach of Amazon's disciplinary policy, specifically “Acts of dishonesty such as claiming Company Sick Pay for non-genuine illness”. Accordingly, Ms Sugden upheld the decision to dismiss Ms Karpes.

20

25 **Submissions**

71. For the respondent, Mr Harris made an oral submission whose terms are briefly summarised below.

72. This was, he said, a dismissal based on the conduct of the claimants. The reason for dismissal was that the claimants were on holiday while claiming full company sick pay, knowing that they should not be, and when they returned and were questioned about it, they lied to the respondent.

5 73. Relying upon the well-known **Burchell** test, he submitted that there is little dispute that there was a genuine belief on the part of the respondent that the claimants had been guilty of gross misconduct, that they had reasonable grounds for that belief, and that that arose out of a reasonable investigation.

74. The genuine belief held by the respondent turned out to be correct.

10 75. At the dismissal stage, the respondent had Facebook images showing the claimants to be in Finland on dates when they were absent on sick leave; there were contradictory stories from the claimants; and there was a lack of evidence brought forward by the claimants to prove that they were not in Finland as they asserted, which would easily have been obtained. At the
15 appeal stage, they admitted to misconduct, and to lying about it in previous hearings.

76. So far as the investigation was concerned, they were given the opportunity to provide evidence or an explanation, and there was little more the respondent could have done.

20 77. Mr Harris then addressed the question of whether the dismissals may be said to fall within the range of reasonable responses. He said that the claimants now appear to accept that they were guilty of misconduct, or at least of lying. Employees of the respondent have limited holiday entitlements. There is nothing to suggest that the requirements for holiday are disapplied when a
25 person is on sick leave. Company sick pay, he submitted, is paid to an employee when they are absent and unable to work due to illness or injury. It is not an opportunity for employees to go on holiday, leave the country and do whatever they are well enough to do.

78. If an employee suffers a family emergency, there are options allowing them to
30 take leave, unpaid or family emergency leave, but these claimants, said

Mr Harris, did not do that. They knew that they should not go abroad while on company sick pay, and the respondent was able to conclude that because they lied when they were asked about it.

79. It was a conclusion open to the respondent to form, that the claimants had been guilty of gross misconduct. Dishonesty is itself gross misconduct. This was not, in Mr Harris's submission, a small untruth quickly corrected. Both claimants were given numerous opportunities to tell the truth and failed to do so. Only before the Tribunal has it been clarified when they were actually in Finland.
80. Mr Harris then turned to consider the procedure followed. He asked that the Tribunal find that Mr Dougan and Ms Sugden be believed in their evidence about what was said or not said at the meetings. The notes of the meetings record what was said. It was agreed that if there was a need for a translator in Russian one could be made available to Mr Trifonov. There were people available who spoke Russian on site, and when Mr Trifonov did ask for an interpreter, one was made available to him quickly.
81. He submitted that the Tribunal should prefer the evidence of Mr Dougan and Ms Sugden to that of the claimants.
82. He argued that the Tribunal should find that it was reasonable for Mr Dougan and Ms Sugden to note that the claimants understood what was being said, at the point when they were both being questioned in the hearings they conducted. Questions asked were answered. When Mr Trifonov had his letter of dismissal read to him, he did not dispute that the letter was accurate, nor suggest that there were misunderstandings betrayed by that letter.
83. Mr Harris invited the Tribunal to find that the dismissal was fair, both substantively and procedurally.
84. He then argued that there was not a shred of evidence to support the claim of discrimination. Mr Trifonov's account of what Mr Dougan said is inconsistent. The respondent had a multi-cultural workforce, and Mr Dougan denied that he took against the claimants because they were Russian. Their treatment

was not linked to race at all. The suggestion that another employee did the same thing and was not treated the same is not supportable on the evidence. The respondent did not know about that matter, and confirmed that it would now be taking steps to investigate this.

5 85. Ms Karpes made an oral submission on her behalf. She said the dismissal was not legal because the contract says nothing about not being allowed to leave the country while on sick leave. Mr Dougan is a reliable witness but he did not always say the truth. Mr Trifonov did ask for a translator and should have been given the opportunity to have one as he could not understand
10 what was going on.

86. She said that when she was asked about what she had said at the various meetings about not being in Finland on the critical dates, she was trying to “win time”. It was not a severe lie and should not have undermined the company’s trust.

15 87. Mr Trifonov was always given harder work, which amounted to discrimination.

88. Dismissing the claimants would not cost the respondent much, she said, but it has cost them both a great deal in money and in stress.

89. Mr Trifonov also made a submission, saying that he saw things from a different angle. He said that he may be unwell but when he receives a call
20 from an ill relative to go home, he has to go home. Did he really have to go to the doctor to stop sick leave to go out of the country?

90. The only reason he was told off was because he speaks his mind. He provided all information to the respondent. He said that if he had been asked straightforward questions, he would have provided straightforward answers
25 and would not have lied. He did not understand the questions being put to him.

The Relevant Law

91. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory

provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 (“ERA”), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

“Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was 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 employers 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 the equity and substantial merits of the case.”

92. Further, in determining the issues before it the Tribunal had regard to, in particular, the cases of **British Home Stores Ltd v Burchell [1978] IRLR 379** and **Iceland Frozen Foods v Jones [1982] IRLR 439**, to which we were referred by the solicitors in submission. These well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

93. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it about three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimant’s conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

94. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds us that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J
5 goes on to state that “the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party.”

10 95. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

15 96. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the
20 *1978 Act is as follows:*

(1) the starting point should always be the words of S.57(3) themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they
25 *(the members of the industrial tribunal) consider the dismissal to be fair;*

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the
30 *right course to adopt for that of the employer;*

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

5 *(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal*
10 *falls outside the band it is unfair.'*

97. Section 13(1) of the Equality Act 2010 (“the 2010 Act”) provides:

15 *“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.”*

Discussion and Decision

98. It is necessary, firstly, to determine the reason for dismissal in this case. In relation to each of the claimants, the reason for dismissal was a reason related to conduct, namely that they had each travelled and left the country
20 during a period of sickness absence for which they received company sick pay; and that they lied about this when asked in their informal absence review meetings.

99. Next, the Tribunal required to consider whether or not the respondent had a genuine belief in the guilt of the claimants. Mr Dougan, the dismissing officer,
25 emerged from evidence as a credible, straightforward and reliable witness whose version of events we were prepared to accept as true. He clearly had a genuine belief that the claimants had been guilty of the allegation made against them. We were not prepared to give effect to Mr Trifonov’s allegation that Mr Dougan somehow “had it in” for him because he was Russian. That
30 allegation was entirely without foundation or substance, and we accepted Mr Dougan’s denial that he had either overloaded Mr Trifonov in his workload or made any comments of an anti-Russian nature towards him.

100. Ms Karpes did not make any such allegation in relation to her own case.

101. We therefore accepted that the respondent had a genuine belief in the claimants' guilt.

102. We then considered whether the respondent had reasonable grounds for that
5 genuine belief.

103. The facts in this case, as presented to Mr Dougan, were that both claimants went off sick from work on the same day, 14 May; that they were both observed on Facebook apparently in Helsinki during the course of that period when they were certified as unfit for work and receiving company sick pay;
10 and that when they were asked about this in the informal review, the investigatory hearing and the disciplinary hearing, they consistently denied that they had been abroad and asserted that they had been at home the entire time.

104. Mr Dougan asked them to provide evidence to back up their assertions about
15 being in Scotland during that time, for example, through bank statements showing purchases or cash withdrawals in Scotland, but neither produced any relevant evidence which clarified the matter.

105. As a result, it is our judgment that Mr Dougan had reasonable grounds on which to base his belief that the claimants had each used certified sick leave
20 to take what amounted to annual leave by leaving the country and visiting family in Helsinki.

106. Both claimants seemed to suggest before us that they had not been on holiday at all, but that they had been attending to a family emergency in visiting Ms Karpes' mother in Finland. We considered that this argument was
25 without any basis. They have used the word "holiday" to suggest that somehow the respondent had misinterpreted their journey to Finland. In our judgment, the issue is not what they did when in Finland, but the fact that they took what amounted to annual leave, as opposed to any other form of leave (such as sickness leave, special leave, family emergency leave) when
30 they were receiving pay for being absent due to unfitness for work. They

could have applied for family emergency leave, had that been appropriate, but they did not.

107. As a result, we were of the view that it was entirely reasonable for the respondent to consider that the claimants had acted dishonestly in accepting
5 company sick pay – which is only payable in the event that the employee is absent for the whole period concerned on sickness absence – when in fact they were using that absence to take a trip which would otherwise require to be taken as annual leave or some other form of leave.

108. The claimants also sought to argue that they could find nothing in their terms
10 and conditions of employment to say that they could not travel abroad while on sick leave. That may be so, but in our judgment, terms and conditions of employment cannot and do not specify every example of misconduct which can be envisaged. It is disingenuous of the claimants to suggest that they did not know they were doing anything wrong, and as Mr Dougan pointed out, the
15 fact that they lied about this on their return makes clear that they were concealing their trip abroad from their employer because they were aware that it was wrong to have done this.

109. They argued that their absence was covered by fit notes which confirmed that they were unfit for work during that time. Again, that is undoubtedly so.
20 However there is no evidence available to inform the Tribunal as to what the attitude of their medical practitioners might have been if they were aware that, having said, for example, that they were unable to fly, they took a trip by aeroplane to Finland. All that can be said is that they complied with the basic rules of the company in submitting their fit notes. The difficulty for the
25 claimants is that by taking what amounted to annual leave during that sickness absence without seeking the permission of their employers, and by following that up by lying about it on their return, they have forfeited the right to be treated as if they were merely on sick leave.

110. It is clear that the respondent did not just dismiss them because they had
30 taken a trip to Finland while off sick and receiving sick pay, but also because they had lied about it on their return, and because they had acted in such a

way as to damage irrevocably the respondent's confidence in them as employees. They both went off on sick leave on the same day; they were both found to have travelled abroad to Finland during that absence; they were both in a position where they could not have applied for annual leave because they had no outstanding entitlement to do so at that point; and they both attempted to cover their tracks on their return. It was not surprising, in our judgment, that the respondent were unprepared to believe them when they sought to make their explanations in the disciplinary hearings.

111. We do not, at this stage, take into account the confirmatory evidence presented to the appeal hearing in the form of bank statements, when it was effectively admitted by them that they had been lying about their whereabouts at the end of May.

112. We considered that the investigation which was carried out, and the procedure which was followed, were entirely reasonable and within the range of reasonable investigations carried out by a reasonable employer. The claimants both had the opportunity to understand the allegations made against them, and the basis for those allegations. They had the opportunity to attend and explain their position. Mr Dougan made it clear, as did Mr Lamond, that if they had information which would support their version of events, that would be taken into account, though they did not provide such evidence at any stage.

113. The issue which the claimants had with the procedure primarily related to Mr Trifonov's allegations that he needed, and asked for, an interpreter in Russian to be available at the hearings he attended. It is not clear whether Ms Karpes seeks to make the same argument, but in our judgment, there was no evidence that she did ask for an interpreter to be present.

114. The evidence demonstrated that Mr Trifonov asked for an interpreter on one occasion, namely when Mr Dougan invited him to meet in order to hand over his letter of dismissal. An interpreter was supplied quickly and efficiently to him.

115. There was another occasion, in the appeal hearing before Ms Sugden, where the possibility of a Russian interpreter was raised, but Ms Sugden proceeded on the basis that if one were needed during the hearing they would be able to obtain one, and Mr Trifonov consented to the appeal hearing proceeding on that basis.

116. In our judgment, other than these two occasions, there was no request by Mr Trifonov for an interpreter, and certainly his own assertion that he had asked for an interpreter on each occasion when he met with a manager about this matter is not borne out either by the records of those meetings or by the evidence of the managers who chaired them. We were not prepared to accept that the evidence of Mr Trifonov on this point was correct. We preferred the evidence of the respondent on this point. Mr Dougan made the observation, with which we agreed, that since a Russian interpreter was available on the occasion of his dismissal, there is no reason why an interpreter would not have been made available on other occasions if requested.

117. It is therefore necessary for us to consider whether the respondent's decision to dismiss the claimants fell within the range of reasonable responses open to a reasonable employer in these circumstances.

118. There are two aspects to this. Firstly, the claimants argued that their offence, if that is what it was, was relatively minor and therefore dismissal was excessive; and secondly, that another employee was treated differently despite having been guilty of the same offence.

119. In our judgment, the evidence does not support either of these contentions. We must remind ourselves that it is not for us to substitute our view for that of the employer in this case, but to consider whether or not a reasonable employer would have dismissed in these circumstances.

120. With regard to the first aspect of this matter, we were of the clear view that dismissal was within the range of reasonable responses open to a reasonable employer in these circumstances. The respondent is a significant employer, and requires to rely upon the honesty of its employees. It is

entirely reasonable for such an employer to take strong action in the face of two employees who have deceitfully sought to secure annual leave while purporting to be absent on sick leave, and then lied more than once when confronted by management about it. This is simply gross misconduct, which has the effect of damaging irrevocably the relationship of trust and confidence between an employer and employee.

121. With regard to the second aspect, we were left with little basis upon which to make any findings in fact about this. When the claimants referred to another employee in the Tribunal proceedings, the respondent carried out some investigation and assured the claimants and Tribunal that they were unaware of this issue at the time, but that action would now be taken against that individual. We did not hear sufficient evidence to enable us to conclude that there was a close relationship between the actions of the claimants and this other individual, but in any event, it was not alleged that the individual had been asked about their absence from work and been shown to have lied about it. As a result, we cannot make any finding to the effect that another employee committed the same offences and was treated inconsistently to the claimants, and therefore we cannot and do not find that this renders the dismissals unfair.

122. Accordingly, it is our judgment that the claimants in this case were not unfairly dismissed, and therefore that their claims of unfair dismissal fail and are dismissed.

123. The claimants also argue that they have been discriminated against on the grounds of race, and in particular, as we understand it, on three grounds:

- That Mr Dougan treated them less favourably on the grounds that they were Russian citizens, and in particular treated Mr Trifonov unfairly on these grounds by imposing upon him an unfairly onerous workload and making discriminatory comments about them as Russians;
- That they were dismissed whereas a comparator was not, in similar circumstances; and

- That the respondent's failure to provide the claimants with the facilities of an interpreter in Russian rendered the processes which they underwent unfair and discriminatory on the grounds of race.

124. We did not find that Mr Dougan treated the claimants less favourably on the grounds that they were Russian. He denied making any discriminatory comments about them on this basis, and we were prepared to accept this denial. He denied that Mr Trifonov was given an excessive workload, and indeed it was tolerably clear to us during his evidence that Mr Dougan was perplexed by this allegation. We were not, therefore, prepared to find that Mr Dougan discriminated against the claimants on the grounds that they were Russian, as was alleged.

125. We did not find that the claimants were treated less favourably than their comparator, for the reasons outlined above. We were not persuaded that the evidence demonstrated that there was any difference in treatment between the two claimants and their comparator. It appears that the name of the comparator was only disclosed to the respondent in the course of this hearing, and the response which was forthcoming was that now that this had been brought to their attention they would seek to act upon it, but no notice was given to the respondent previously in these proceedings as to the identity or circumstances of that comparator. Accordingly, we do not uphold this allegation.

126. Finally, we have not been prepared to accept that the respondent acted in any way other than fairly in the matter of a Russian interpreter. They provided one when it was expressly asked for. They indicated on one other occasion that an interpreter could be sought if necessary, and no further request was made. They believed, reasonably in our view, that the claimants could understand English well enough to follow what was happening in the hearings. Accordingly, we were not prepared, on the evidence, to uphold this allegation.

127. In all of the circumstances of this case, therefore, it is our conclusion that the claimants' claims of discrimination on the grounds of race fail and are dismissed.

5 **Employment Judge: Murdo Macleod**
Date of Judgment: 18 June 2019

Entered into the Register: 19 June 2019

And Copied to Parties