EMPLOYMENT TRIBUNALS

Claimant: Mr D Abdillahi Elmi

Respondent: Sodexo Limited

Heard at: Manchester by CVP **On:** 30 June 2021
1 and 2 July 2021
16 September 2021
(in Chambers)

Before: Employment Judge Holmes
Mr D Wilson
Ms J Whistler

REPRESENTATION:

Claimant: In person
Respondent: Mrs A Niaz-Dickinson, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed.

2. Had a fair procedure been followed, the claimant would have been dismissed in any event, so that the compensatory award should be reduced, pursuant to the principle in ***Polkey*** by 100% to reflect that. He would not, however, have been dismissed for a further 6 days, and the Tribunal proposes to make a compensatory award of 6 days' net pay.

3. The Tribunal makes no further reduction in the compensatory award for contributory conduct.

4. The Tribunal proposes to make a basic award, with no reduction for contribution or ***Polkey***.

5. The dismissal was not an act of race discrimination, and this claim is dismissed.

6. The parties are to seek to agree remedy. In default they are to notify the Tribunal that a remedy hearing is required by **5 November 2021.** Any such notification is to include an estimated length of hearing, the issues to be determined, and dates to avoid in 2022.

REASONS

Introduction

1. By a claim form presented to the Tribunal on 18 April 2020 the claimant brings complaints of unfair dismissal and race discrimination , arising out of his dismissal on 26 November 2019 from his post as a domestic cleaner at Wythenshawe Hospital, where the respondent was contracted to provide various services to a local NHS Trust. Those services included cleaning , and food preparation and delivery.

2. The respondent admits that the claimant was dismissed , but denies that his dismissal was unfair , and denies any race discrimination. A preliminary hearing was held on 28 September 2020 by telephone which the claimant attended in person. The claims were identified, and the issues were clarified. Case Management Orders were made. The claimant confirmed that his only claims were of unfair dismissal and race discrimination. The discrimination complained of was his dismissal. Whilst he had referred to other alleged acts of discriminatory treatment (see paragraphs 5.1-5.8 of the Case Summary), he confirmed that he was not making claims in respect of those matters , but was referring to them only as background.

3. The claimant appeared in person and the Tribunal was assisted (greatly) by an interpreter, Ms Mohamed. The respondent was represented by Mrs Niaz-Dickinson of counsel. The hearing was held by CVP, as all parties agreed to this.

4. No interpreter was available for the first day of the hearing on 30 June 2021 (not the fault of Ms Mohamed, who was only booked the following day) , and consequently the Employment Judge went through the issues , and other case management issues with the claimant, pointing out how his own witness statement was very short , and did not include matters that are set out at paragraphs 5.6-5.8 of the Case Management Summary. The claimant appeared to understand this and said that he would address these issues. On 1 July 2021 the interpreter was available, and the hearing commenced.

5. The hearing commenced with live evidence being heard on 1 July 2021 when the interpreter was available. The respondent called Kath Dennis, a Hotel Services Manager. The claimant, after a postponement to ensure that he had read her statement, cross-examined her. The respondent then called Kevin Clifton, a Senior Service Manager, who heard the claimant's appeal against his dismissal. The hearing continued into 2 July 2021 with Kevin Clifton’s evidence, which concluded the respondent’s case. The claimant then gave evidence himself , but called no witnesses.

6. At the conclusion of the third day of the hearing there was a discussion as to how the Tribunal was to receive the parties' closing submissions. The respondent's counsel had prepared written submissions and provided those to the Tribunal. The claimant was asked as to whether he wished to make any oral or written submissions in reply. After a discussion with the assistance of the interpreter the claimant said that he had said everything that he wanted to say , and had little to add. He therefore declined to make either oral or written submissions.

7. The Tribunal relisted the matter for an in chambers discussion for 16 September 2021. In the interim, however, having considered the respondent's written submissions, the Employment Judge caused the Tribunal to write to the respondent to address one specific issue that did not appear to have been covered in those written submissions. That related to the evidence of Kevin Clifton, who conducted the appeal, in relation to an error that had been made in the letter convening the disciplinary hearing, which he understood to have been held in accordance with the respondent's procedure with the requisite number of days notice. He conceded, however, in cross examination, that he had not appreciated that the hearing had in fact taken place a day earlier, because reference was made to it being held on a Wednesday when it was actually held on a Tuesday. This appeared to be a potential procedural defect, the respondent's not following its own procedure, but this had not been addressed in the respondent's written submissions. Consequently, by a letter of 13 July 2021 the Tribunal wrote to the respondent and invited further submissions on this specific point.

8. That further response to the Tribunal's specific queries was received by the Tribunal on 2 August 2021 , and was copied to the claimant.

Findings of Fact

9. Having heard the evidence of the witnesses, considered the submissions of the parties and the documents in the agreed bundle, the Tribunal unanimously finds the following relevant facts:

9.1 The respondent is contracted to provide domestic and patient catering services to Manchester University NHS Foundation Trust at Wythenshawe Hospital, South Moor Road, Manchester. The claimant was employed by the respondent as a Domestic Assistant, undertaking general cleaning duties within various departments , and wards , in that hospital. He was not engaged in food preparation or delivery, and it would not normally be part of his duties to be inside a kitchen or food preparation area. His employment had (he asserts, though this is disputed) started on 13 January 2010, and he worked 35 hours per week.

9.2 The claimant had no disciplinary record with the respondent. Kath Dennis was the Hotel Services Manager. Beneath her were two deputy managers and a training supervisor, with 23 other supervisors on various shifts. She was not the claimant's direct line manager, but was his ultimate line manager.

9.3 On 8 November 2019 Graham Lamb, Monitoring Officer for Estate and Facilities within the NHS Trust, and therefore not an employee of the respondent, sent an email (page 75 of the bundle) to Kath Dennis, in the following terms:

"Hi Kath,

I wanted to draw your attention to Bronte ward. I was about to do a lunchtime audit when Kenny and I entered the regen kitchen before lunch service began where Dahir was standing by the microwave. He was taking a cheese bap out of the microwave whilst eating another one, he saw me, put the sandwiches down and walked out (as you can see from the attached). The rolls looked like they had been taken from the patients' soup rolls as one bag was 2 rolls short and the cheese was grated cheese which had been warmed so was part melted. Obviously I can only report what I saw and there may be another explanation."

9.4 He attached to that email a photograph (page 76 of the bundle) of a half-eaten cheese bap next to another cheese bap on a surface in the kitchen.

9.5 The "Kenny" referred to was Kenny Green, another employee of the respondent. He was a Patient Services Assistant ("PSA") whose work did involve him in working in the kitchen, unlike the claimant.

9.6 Kath Dennis, having received the report, approached Meg Smith, Deputy Hotel Services Manager, to carry out an investigation. Meg Smith did so, and her report is at pages 84-86 of the bundle. In the course of her investigation she interviewed Kenny Green twice on 11 November 2019 at 8:50 and again at 11:00. She also interviewed the claimant on 11 November 2019, and the notes of these interviews are at pages 77- 82 of the bundle.

9.7 In his interviews Kenny Green said that he had seen nothing and did not see the claimant with any bread in his hand or on top of the microwave. The claimant denied taking any bread and gave a very brief account in which he simply denied the allegations.

9.8 Meg Smith did not interview Graham Lamb face to face , but had a telephone conversation with him which is noted at page 83 of the bundle on 15 November 2019. He confirmed what he had seen and added that he had seen the bread actually in the claimant's mouth as he entered the kitchen and that he had taken the photograph when the claimant had put the bread down on top of the microwave.

9.9 Meg Smith then prepared a report (pages 84-86 of the bundle) which included (although these documents do not appear immediately after the report in the bundle) the email from Graham Lamb, the photograph taken by him and various other documents including what is referred to

as a “pick list” for the Bronte ward, a copy of the food monitoring sheet for the day in question and notes of the interviews with the claimant and Kenny Green.

9.10 The claimant was invited to a disciplinary hearing by a letter dated 21 November 2019 (pages 87-88 of the bundle). That letter invited him to a formal disciplinary hearing on “Wednesday 26 November 2019”. That, however, was an error, because the 26 November 2019 was a Tuesday and not a Wednesday. The letter set out the allegation against the claimant, namely that on 8 November he had been witnessed eating a roll with cheese on it , and removing another roll from the microwave in the regen kitchen. The claimant was advised of his right to be accompanied by a colleague or a trade union representative, and the letter enclosed the investigation report together with the attachments of the witness statements, a photograph, the meeting notes, the food monitoring sheets and a copy of the respondent’s disciplinary, performance and capability policy and their rules of conduct.

9.11 On 26 November 2019 the claimant saw Meg Smith , and informed her that he would not be able to attend his disciplinary hearing because he did not receive his invitation until the previous Saturday (23 November 2019) and had been unable to arrange union representation. This is documented in an email from Meg Smith to Kath Dennis at page 89A of the bundle. Meg Smith, however, was able to arrange a union representative for the claimant, and his disciplinary hearing accordingly did take place at 10.00am on 26 November 2019, with Andrew Lalley from the union present to represent him. The disciplinary hearing was held by Kath Dennis, and the notes are at pages 90-92 of the bundle.

9.12 In the meeting the claimant continued to deny the allegation. Nothing was said by the claimant or his union representative about the timing of the meeting or that the claimant had not had sufficient time to prepare for it. The claimant confirmed that he had read through the pack that he had received ahead of the meeting.

9.13 After five minutes, in the light of the claimant's denials, Kath Dennis adjourned in order to seek advice before resuming the meeting five minutes later and continuing her questions of the claimant. The claimant maintained his denials and claimed that he had never seen any rolls on the side in the kitchen. In terms of the allegation being made by Graham Lamb, the claimant effectively said that he was lying about what he had seen. Kath Dennis considered what the claimant said and consulted the rules of conduct in the course of this meeting. At the end of the meeting she noted that the claimant had maintained that the Trust’s Monitoring Manager, Graham Lamb, was lying and that the claimant was denying the allegation. She concluded that the claimant had indeed been guilty of gross misconduct , and dismissed him at the conclusion of that meeting. The claimant was advised of his right to appeal within five days of receiving his letter of dismissal.

9.14 Kath Dennis told the Tribunal that she had no reason to believe that Graham Lamb was lying , and believed that the claimant had indeed taken the bread rolls. The claimant's continued denials concerned her, and she concluded that the respondent could no longer trust him. She requested the claimant's ID card, which he did not have with him, and so then Elaine Smith escorted him to his car to go and get it.

9.15 Kath Dennis then prepared a case outcome document (pages 93-94 of the bundle) in which she set out the evidence presented, and the arguments considered in the hearing. She set out in section 3 of that document the reasons for her decision, which were predominantly that there was reasonable cause to believe what Graham Lamb had told the respondent.

9.16 The claimant exercised his right of appeal , and did so by email of 27 November 2019. In this email he accused Kath Dennis of behaving unprofessionally and provocatively towards him. He complained that he had invited him to a meeting at short notice and that when he had not been able to arrange union representation someone was arranged for him. He challenged the allegation , and said that it was his word against that of Graham Lamb. He went on to point out there was no witness. He made reference to being asked to hand over his ID badge and leave the building. He claimed that he had not been given any written documents for his dismissal or the reason for it. He went on to say that he had been working for the respondent for the past ten years with no disciplinary record. He said he was aware of the company rules and would not jeopardise his work. He wanted the respondent to apologise to him for the unfounded allegations made against him.

9.17 The claimant's dismissal was confirmed in a letter dated 29 November 2019, in which the decision was confirmed. This letter, however, does contain an error in that there is reference made to the claimant being present in the kitchen when the Trust Monitoring Manager and the "Sodexo Catering Manager" entered. The other person, of course, was not a Catering Manager but was Kenny Green, who was a PSA. The letter, however, from Kath Dennis confirmed her reasons for the claimant's dismissal , and the formalities that would then follow in relation to his pay and P45.

9.18 The claimant's appeal letter was acknowledged by a letter dated 29 November 2019 (page 98 of the bundle) and on 6 December 2019 the claimant was sent an invitation to an appeal hearing to be heard by Kevin Clifton, Senior Services Manager, on 12 December 2019. The claimant was advised again of his right to be accompanied at that appeal hearing.

9.19 The appeal was duly heard on 12 December 2019, and the claimant was again represented by Andrew Lalley, the union representative who had accompanied him to the disciplinary hearing. The notes of the appeal hearing are at pages 100-102 of the bundle.

9.20 In the appeal hearing Kevin Clifton initially dealt with the claimant's allegation that Kath Dennis' behaviour had been provocative and unprofessional , and asked if this had been raised in the meeting with her. The claimant accepted that he had not done so. Kevin Clifton asked Andrew Lalley, however, if he considered that her behaviour was of that nature, and he replied that he did not feel that it was. The claimant, however, went on to say that she had not listened to him and would not let him finish.

9.21 Kevin Clifton went on to deal with the second point in relation to the timing of the meeting , and the union representation that was arranged for the claimant. In terms of the late notification of the disciplinary hearing this, Kevin Clifton said, had been due to the Royal Mail. He confirmed that the claimant had met with Andrew Lalley before the disciplinary hearing.

9.22 The appeal hearing then went on to discuss the claimant's complaints about being required to hand in his ID badge and being escorted off the premises. He confirmed that this was by Elaine Smith.

9.23 Andrew Lalley later in the appeal hearing made the point that there was no evidence to show what happened in the room between the claimant and Graham Lamb. He pointed out the claimant was adamant that he did not eat the bread. The claimant pointed out that Kenny Green had not seen anything, but Graham Lamb had. Kevin Clifton adjourned the meeting for a short time , and upon resumption informed the claimant and his representative that he had reviewed the notes , in particular of Kenny Green's interviews. He went on to say that he was going to uphold the original decision and that the claimant had brought the company into disrepute by eating food in front of a member of staff of the Trust. The claimant had had the opportunity to own up to the allegation but had failed to do so, and on a balance of probability he believed that the claimant had taken and eaten the bread rolls.

9.24 Kevin Clifton provided a written outcome and rationale for decision document (pages 103-104 of the bundle). In red annotations on that document he added notes of matters that he had taken into consideration in reaching his decision. One of those was that the claimant had been given time with his union representative prior to the meeting to go through the disciplinary pack, and that this had not impacted on the meeting or the outcome. In relation to the ID badge, he considered this was standard practice and was no ground for overturning the decision.

9.25 The appeal hearing outcome was confirmed to the claimant in a letter dated 20 December 2019 (pages 106-107 of the bundle). Kevin Clifton in this letter went through the five points that were raised as grounds of appeal, and set out his findings in relation to them, which were largely based upon the notes that he had made on the previously referred to document. He upheld the original decision and dismissed the appeal.

9.26 In terms of further evidence in relation to the claimant's complaint of race discrimination, the claimant relied upon the following:

The duty manager Elaine Smith and her son Daniel treat black people differently. The claimant applied to work weekends up to 4 times but got no answer. In January 2019 a white colleague, Steve Duffy, applied and was given weekend work within one week of asking;

In April 2019 the claimant applied for a permanent position but the job was given to a white female work colleague;

When the claimant was suspended Elaine Smith and her son Daniel treated the claimant badly. On one occasion Daniel refused to allow the claimant to go to the toilet;

9.27 The Tribunal did not hear from any of these persons, and was unable to make findings in relation to these allegations as alleged acts of race discrimination. They will, however, be assumed as facts in the claimant's favour for the purposes of the Tribunal's decision.

10. Those then are the relevant facts as found by the Tribunal.

Witnesses

11. In terms of the witnesses, the Tribunal found no reason to doubt the honesty and integrity of Kath Dennis and Kevin Clifton. Indeed the latter was open and candid when he accepted that he had not noticed that the invitation letter to the claimant's disciplinary meeting contained an error , in that it stated that that was held on Wednesday when it was in fact on a Tuesday, and thereby the claimant had been given less than the requisite two working days' notice required for such a hearing.

12. The claimant by contrast, making allowances for the fact that he was speaking through an interpreter, did strike the Tribunal as somewhat less honest and open in his responses. There were instances where he initially disputed something , but then subsequently accepted it had happened. One example was that he denied that Kath Dennis had had to break in their disciplinary meeting, but subsequently agreed that there had been such a break.

13. Ultimately, however, very little if anything turns upon the credibility of these witnesses , save in respect of any motivation on their part relating to the claimant's race.

Submissions

14. The parties were invited to make submissions. Mrs Niaz-Dickinson had prepared written submissions, and these had been provided to the claimant. The claimant was able to read these in private with the assistance of the interpreter on the last afternoon of the hearing. There was a discussion as to how the parties

should deal with submissions and ultimately the claimant declined to make any oral or written submissions, saying in effect that he had said everything he wished to say.

15. The claimant was reassured by the Employment Judge that the Tribunal would consider any points that could be made on his behalf and would be made were he to be represented, and that consequently his interests would be protected even if he felt unable to make any closing submissions.

The Law

16. The law relating to the two types of claim is well-established. In relation to the law for unfair dismissal, the relevant statutory provisions are set out in the first part of the Annex hereto. As this is a conduct dismissal, the Tribunal applies the well-known for conduct dismissals set out in the case of ***British Home Stores Ltd v Burchell [1978] IRLR 379*** , where Arnold J. in giving the judgment of the EAT said this:

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.

17. Further, the Tribunal in approaching the fairness of the dismissal does not take a decision based on what it would have done in the circumstances and substitute its own views, but rather applies the test of the range of reasonable responses as required to by cases such as ***Foley v Post Office*** and ***Midland Bank v Madden [2000] ICR 1283***

18. In relation to the complaint of race discrimination, the claimant's claim is of direct race discrimination contrary to section 13 of the Equality Act 2010. Only the dismissal is complained of.

19. In terms of the law to be applied in direct discrimination cases, it is clear from cases such as ***Madarassy v Nomura International plc [2007] IRLR 246*** that in order to succeed in a complaint of race discrimination a claimant needs to do more than simply assert that he has been unfavourably treated and has the requisite protected characteristic. As has been made clear in the authorities, those mere facts are not in themselves sufficient, the claimant has to do something more to shift the burden of proof which then falls onto the respondent under section 136 of the Equality Act 2010.

Discussion and Findings

Unfair Dismissal

20. The first test that the Tribunal has to apply is whether the respondent has shown a potentially fair reason for the dismissal under section 98. In this case the respondent says clearly that the reason was conduct. The Tribunal either accepts or does not accept that reason, and the claimant had put forward no evidence upon which the Tribunal could safely conclude that conduct was not indeed the reason for his dismissal. He has not suggested any other ulterior motive, and other than being motivated by his race, he has not suggested that the respondent had any other reason to wish to dismiss him.

21. Having concluded that the respondent has established a potentially fair reason, the next question is whether the dismissal was fair in all the circumstances. That includes an assessment in conduct cases of the reasonableness of the investigation and the procedure that subsequently ensued.

22. In terms of the former, the Tribunal has no reason to question or criticise the investigation carried out by the respondent. This was a very simple allegation brought to it by the manager of the client Trust, Graham Lamb, initially in an email, which was then investigated by Meg Smith. She investigated it by interviewing Kenny Green twice and the claimant once, and although she did not interview Graham Lamb face to face, she nonetheless had a telephone call with him which confirmed his account. She already had, of course, his email. Graham Lamb is not, it is to be noted, an employee of the respondent but of its client. In these circumstances the Tribunal considers that the investigation into his evidence by the phone call that was had was indeed reasonable , and there was no requirement for the respondent to have a face to face interrogation of him, particularly given his position. Additionally, of course, the respondent had been sent the photograph of the half eaten bread roll, which showed that someone must have eaten it.

23. In terms of the allegation, it was a simple one and the claimant was given an opportunity, as was Kenny Green, to comment upon it. Kenny Green's evidence took the matter no further, and it was indeed , as the claimant observed subsequently , a matter of his word against Graham Lamb. But in terms of that investigation, given that Meg Smith also investigated surrounding evidence such as the documentation relating to food which was in the kitchen for that ward on the day in question, and any other surrounding circumstantial evidence, the Tribunal is quite satisfied that the investigation she carried out was a reasonable one.

24. The question then is whether the conclusion that Kath Dennis came to in the disciplinary hearing following Meg Smith's investigation report was a reasonable one. This was simply a question of whether she accepted the evidence of Graham Lamb in its written form , and as set out in the investigation, or whether she should have rejected that evidence. The claimant simply denied the matter and Kenny Green did not take the matter any further. Graham Lamb was alleged to have been lying, but the claimant neither in the disciplinary, the appeal nor in this hearing, has put forward any reason why he should do so. Given the position that Graham Lamb held as effectively a manager in the client Trust, the respondent would have to have some

very good reason to disregard his evidence. The claimant gave the respondent no such reason , and it was entirely reasonable in our view for the respondent , in the person of Kath Dennis , to accept that evidence and to conclude, in the face of the claimant's bare denials, that he had indeed done what the evidence suggested he had in taking rolls in the kitchen in this way. An employer does not have to operate to the criminal standard of proof beyond reasonable doubt. It is entitled to act on a balance of probabilities. Provided that a reasonable investigation has been carried out, and the employee has been given a chance to have his say, that is enough.

25. That evidence therefore entitled the respondent to come to the conclusion that the claimant was guilty of misconduct, so as to then require an investigation as to whether the sanction that was then imposed fell within the band of reasonable responses. As was made clear in the course of the evidence, had the claimant accepted responsibility for his actions then the respondent might have been able to consider a lesser sanction, such as a final warning. The claimant's denials, however, gave the respondent a further difficulty in that the respondent then felt it could not longer trust the claimant.

26. In those circumstances the Tribunal is satisfied that the respondent acted within the band of reasonable responses in treating the conduct as sufficient reason for the dismissal. Whilst a relatively minor matter, with only a low value item involved, which may well then have been thrown away, the fact remains that this misconduct had been witnesses by the respondent's client. Had the respondent been able to report back that the claimant had accepted that he had done something wrong, and given assurances he would not do it again, that might have been the end of the matter, perhaps with a warning. The claimant's refusal, however, to accept this meant that the respondent could not take that approach. The dismissal therefore was, in the Tribunal's view, fair , and certainly within the band of reasonable responses.

27. That view , however, is subject only to the issue as to whether the admitted defect in the procedure that was followed, in giving the claimant one less working day's notice of the disciplinary hearing than was required by the respondent's own procedure , renders the dismissal unfair.

28. In the further submissions received from the respondent Mrs Niaz-Dickinson argues that the Tribunal should not find that this defect renders the dismissal unfair. She has cited the authority of ***Polkey v A E Dayton Services [1988] ICR 142*** and in particular the dictum from Lord MacKay of Clashfern at paragraph 5 where he says (reference to "the code" being to the relevant ACAS code of practice) :

"Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the Industrial Tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee."

29. She goes on to cite the Judge of Lord Bridge of Harwich where he says at paragraph 28:

"In the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

30. Her contentions are that the difference of a day is so minimal as to not vitiate the fairness of this dismissal. The claimant was given long enough before the disciplinary hearing, did have a chance to consult with his union representative , and said that he had read through the pack that he had been sent in advance of the meeting. The issues were very straightforward in relation to the incident, and this was not a case where the claimant needed very long to be able to adequately represent himself in the disciplinary hearing. Further, she makes the point that no point was raised about this in the appeal, and the claimant had the same union representative as he had in the disciplinary meeting when he attended the appeal. Consequently, she maintains that the Tribunal should not hold that the minor defect in the procedure followed by the respondent by one day should affect the fairness of the dismissal.

31. The Tribunal has considered Mrs Niaz-Dickinson's representations in relation to the effect of the procedural defect upon the fairness of the dismissal. The Tribunal takes the point she makes from the authorities that not every procedural defect will vitiate a dismissal so that the Tribunal must find a procedurally unfair dismissal in every instance of failure to follow a set procedure. In assessing this issue, however, the Tribunal takes into account not only this specific failure to give one day's additional notice of the disciplinary hearing , but puts it in the context of other facts. Those facts are that the claimant on the morning of the disciplinary hearing informed the respondent that he wanted a postponement of the disciplinary hearing because he could not find a trade union representative of his choice. The respondent, however, dealt with that by appointing one for him. His disciplinary hearing was at 10.00am. It is unclear precisely how long the claimant and his trade union representative had together before that hearing, but it cannot have been long. That cannot have given the union representative very long to consider the investigation and disciplinary pack that had been provided to the claimant. Further, English is not the claimant's first language, and although he manages well and has done in his employment for many years, that is a further factor to be taken into account in terms of whether the procedure that was followed was fair. Additionally, whilst it is the procedure applicable to the process, the time allowed under it is itself very short, two working days. The loss of one of those days is thus rather more significant than had a loner period been prescribed.

32. It is appreciated that no complaint was made in the disciplinary hearing about this, and that the claimant subsequently used the same trade union representative in his appeal. The failure of the respondent, however, to follow its own procedure in respect of the number of days' notice, itself a very short period, combined with its actions in requiring the claimant to proceed to that disciplinary hearing with a trade union representative of its choice and not his, does, in the view of the Tribunal, and without substituting its own views, amount to unreasonable procedural conduct such as to entitle the Tribunal to find that procedurally this dismissal was unfair. A reasonable employer follows its own procedures. This one did not, and has advanced no reason other than simple error, as to why it did not.

33. The claimant had not, it is to be noted, been suspended. Whilst it is commendable and generally desirable that disciplinary procedures are not delayed, the respondent has not really explained the urgency in having this particular disciplinary hearing so quickly. If there had been some pressing issue, the respondent could at that point have considered suspension if that was felt appropriate, though it previously had not been. The position therefore was that the claimant was, in circumstances where he was getting less than the procedural notice, being required to participate in a disciplinary process which could , and indeed did , lead to his dismissal, with inadequate notice, a trade union representative that was not of his choosing and at a time that was not of his choosing , when he had had very little time with that representative before the hearing. All those matters the Tribunal considers do amount to unfairness , and the dismissal was accordingly unfair.

34. Those issues, however, are potentially highly relevant to remedy and will be considered below.

Race Discrimination

35. Before considering remedy in relation to the unfair dismissal claim, however, the Tribunal now moves on to consider the claimant's complaint of race discrimination. His only complaint is that his dismissal was an act of race discrimination and is an act of allegedly direct race discrimination. From the authority of ***Madarassy v Nomura International plc [2007] EWCA Civ 33*** it is clear, and has been for a long time, that it is not sufficient for a complainant in a race or other discrimination claim simply to rely upon the unfavourable treatment and their possession of the relevant protected characteristic. There must, as has been put by Mummery LJ, be “something more”.

36. The Tribunal has therefore looked in this case to see if there is anything more so as to enable the claimant to satisfy the initial burden of proof upon him (recently reaffirmed in the Supreme Court in the case of ***Royal Mail Group v Efobi [2021] UKSC 33, [2021] 1 WLR 3863***) so as to reverse the burden of proof under section 136 of the Equality Act 2010.

37. The difficulty for the claimant is that his dismissal was not initiated by the respondent but by Graham Lamb, who is not its employee. In terms of whether he was racially motivated, the Tribunal explored in the evidence with the claimant as to whether there was any prior history with Graham Lamb from which the claimant could perceive any racial bias. He was unable to refer to any such history, and indeed hardly knew Graham Lamb. He produced no evidence to the Tribunal of any racially motivated behaviour in the past from Graham Lamb towards him or indeed towards any other member of any ethnic minatory. In short, there is no evidence before the Tribunal that the claimant has adduced of any racial motivation on the part of Graham Lamb in initiating these disciplinary proceedings.

38. It is appreciated , of course , that that does not mean that the respondent did not behave in a racially motivated manner, but it is important to remember that the genesis of this disciplinary action being taken at all was Graham Lamb’s report of the incident.

39. Whilst the claimant has referred to other incidents in the past in relation to promotion opportunities and the like , these related to Elaine Smith, and her son, neither of whom made the decision to dismiss. Assumed as facts in the claimant's favour, they are not, in themselves, necessarily acts of race discrimination. Again the claimant only points to differences in treatment, and his race. If these were claims, he would similarly struggle to shift the burden of proof.

40. But even if these were instances of racist behaviour by Elaine Smith , and/or her son, none of this evidence in relation to these matters relates to the actions of either Kath Dennis or Kevin Clifton. They were the decision makers, and there is no basis for imputing to them any racial motives that may have influenced the conduct of these other two employees.

41. The Tribunal appreciates that whilst Graham Lamb may not have had racial motives himself, he may nonetheless be alleged to have given Kath Dennis an opportunity to take action against him on the basis of her own racial prejudices. There was, however, no evidence before the Tribunal upon which it could come to such a conclusion. The claimant has done nothing, therefore, to put before the Tribunal the "something more" that is required for him to begin to reverse the burden of proof in discrimination claims of this nature, and consequently his race discrimination claim must fail, and is dismissed.

Remedy in respect of unfair dismissal

42. The Tribunal returns, therefore, to the unfair dismissal claims, and its finding that the dismissal was unfair on procedural grounds. Mrs Niaz-Dickinson for the respondent argues in the alternative for reductions in both the compensatory and the basic award, firstly on the basis of ***Polkey v A E Dayton Services***, cited above, and secondly on the basis of contributory fault, under s.123(6) of the Employment Rights Act 1996. She seeks these in respect of both heads of award.

43. Turning to the first of these, the ***Polkey*** reduction, this of course can be made by a Tribunal if it is satisfied that notwithstanding procedural unfairness, had a fair procedure been followed the claimant would have been dismissed in any event. In some cases the Tribunal makes an assessment of the likelihood of that happening in percentage terms , which can range from 0% to 100%. In this case the respondent contends that the Tribunal should make a 100% reduction on the basis that had a fair procedure been followed the claimant would still have been dismissed.

44. The claimant not being legally represented or a lawyer has not addressed these issues specifically, but one can imagine that on his behalf it would be argued that no reduction should be made , because that would not necessarily have been the case. Had a fair procedure been followed he may well have retained his employment. Alternatively, it may have been said that the Tribunal cannot make a sensible determination of that , and therefore should make no reduction or, in the alternative, that the best the Tribunal can do is to conclude that he would have had a 50% chance of being retained had a fair procedure been followed.

45. The Tribunal's view, having taken into account in particular what occurred on the appeal , when the claimant did have another opportunity to put his case, but still

maintained his denial of the allegations, is that the claimant would have been dismissed in any event , had a fair procedure been followed. The basic problem for the claimant is that the respondent accepted the evidence of Graham Lamb that he had been guilty of the misconduct alleged, and the claimant maintained his bare denials throughout and maintained them at appeal. The Tribunal has no basis to believe that had a fair procedure been followed the claimant would have done anything differently, and those denials in the face of the respondent's acceptance of Graham Lamb's evidence would not have assisted him . He would still have been dismissed. He was dismissed largely because of the denials, it being clear that had he accepted responsibility , the respondent might have been able to impose a lesser penalty. But, whilst he maintained those denials, the respondent continued, and would have continued, to have no trust in him and he would still have been dismissed.

46. That leaves the question in relation to the compensatory award as to over what period the Tribunal should make any award. The starting point the Tribunal considers is that clearly the respondent, had it followed a fair procedure, would have given him another day's notice of the disciplinary hearing, and on that basis he is entitled to at least one day's pay. The issue in relation to representation, however, goes a little further than that, as under the ACAS Code of Practice on Disciplinary and Grievance Procedures the claimant would have been entitled to seek a representative or accompanying employee of his choice, and under section 4.15 of the ACAS Guide, if a worker's chosen companion will not be available at the time of the proposed hearing , the employer must postpone the hearing to a time proposed by the worker provided that the alternative time is both reasonable and not more than five working days after the date originally proposed. Had, therefore, the respondent followed the ACAS Code of Practice , as well as its own procedure, the claimant would have had a further five days in which to seek representation, or accompaniment of his choice , as opposed to that provided by the company. In those circumstances that would have prolonged his employment by six days, and the Tribunal accordingly proposes to make a compensatory award on the basis of six days' loss of earnings.

47. It has been said that the basic award should not be reduced on the basis of ***Polkey*** in circumstances in which it is designed to compensate the dismissed employee for a failure to pay a redundancy payment (see ***Taylor v John Webster, Buildings Civil Engineering* EAT/1097/97, *[1999] ICR 561***).Here, it was said by Mr Justice Lindsay that '[counsel for the employer] accepts that no authority can be found for a *Polkey* reduction of a basic award.' This observation was made after the judge had considered the five express grounds upon which basis a basic award may be reduced. As was said by HHJ Langstaff P in ***Grantchester Construction (Eastern) Ltd v Attrill UKEAT/0327/12 (14 January 2013, unreported)***:

"the basic award, … is not affected by the **Polkey** *deduction except in the exceptionally rare case where such a (fair) dismissal might have taken place virtually contemporaneously with the unfair dismissal which actually occurred."*

48. The respondent, however, also urges the Tribunal to make reductions to both the basic award and the compensatory award on the basis of contributory fault. That

contributory fault is alleged to be the taking of the bread from the kitchen which led to the claimant's dismissal. Reduction is sought in respect of both awards. Technically, the test in respect of section 122 (the basic award) and section 123 (the compensatory award) is slightly different , in that in respect of the latter the contributory conduct must have contributed towards the dismissal, whereas in respect of the former it need not. Where, however, the Tribunal is proposing making a reduction in respect of the latter, the case law is clear that the Tribunal should normally make such a reduction in respect of the basic award as well.

49. In order to make such a reduction, however, the Tribunal would have to be satisfied , as a matter of fact , that the claimant had taken the bread and therefore was guilty of the conduct that led to his dismissal. The difficulty for the respondent in that is that it has not called Graham Lamb , who is the only witness to that conduct. The Tribunal is nonetheless being invited to find as a fact that the claimant actually was guilty of that misconduct. The test here, therefore, is different to that which the Tribunal has applied in the unfair dismissal claims, as there the Tribunal is only concerned with the belief that the respondent held , and whether it did so on reasonable grounds , and after a reasonable investigation. The Tribunal for that purpose is not required, and indeed should not, come to its own view as to whether or not the claimant was guilty of the conduct that the respondent ultimately found against him.

50. In terms of finding as a fact, however, that he was so guilty, the Tribunal is hampered by the lack of evidence from the only witness, Graham Lamb. That is a matter for the respondent , in terms of what evidence they call in support of this contention, but without that direct evidence the Tribunal is left with the evidence of the claimant , and the secondary evidence from the investigation conducted by the respondent.

51. In certain circumstances a Tribunal may be satisfied solely on the basis of the evidence of a claimant, or upon admission or concession by a claimant, that they have actually been guilty of the misconduct that has led to their dismissal. This claimant, however, has maintained his denials before the Tribunal. The Tribunal has not had the benefit of hearing from Graham Lamb, the only other direct evidence as to this incident. The Tribunal is not prepared to hold on the evidence before it that the claimant is not telling the truth , and actually did take the bread that he is alleged to have taken. It accepts that he may have done so. That is not, however, sufficient to satisfy the burden of proof , on the balance of probabilities that he actually did, and without hearing from the only direct eye witness, Graham Lamb, the Tribunal is not prepared to come to the conclusion that the claimant was actually guilty of this misconduct. It cannot therefore make that finding of fact , and cannot on that basis therefore find that there was contributory fault.

52. In any event, were such contribution to have been found as a fact , the Tribunal would not have reduced the basic award in any event. Whilst such conduct may have been wrongful, the Tribunal would not consider that that outweighed the requirements upon the respondent to follow a fair procedure, and that this should not be sufficient in these circumstances , given the size and resources of the respondent to relieve it of the consequences of failing to follow a fair procedure in this instance.

For all those reasons , consequently the Tribunal will make no further reduction to either the basic award or the compensatory award.

Remedy.

53. The Tribunal has indicated therefore that it proposes to make a basic award, in respect of unfair dismissal, and a compensatory award limited to six days' pay. No loss of statutory rights award is appropriate , given that the claimant would have been dismissed in any event. In terms of those calculations, it is noted that there is an issue in respect of the claimant's length of service. That has not featured in the hearing , as it was not relevant as the claimant has qualifying service on any view. The claimant, however, contended in his claim form that his employment started in 2010, but the respondents in their evidence have suggested that it did not start until 2013. This is obviously important for calculation of the basic award, which of course relates to the claimant's length of service. In respect of the compensatory award, however, there should be no difficulty , as this is simply a question of calculating what six days' net pay would have been, subject to any mitigation or benefits received by the claimant in this period, which appears unlikely.

54. The parties are therefore invited to consider remedy , and to seek to agree it. They are to notify the Tribunal, however, if a remedy hearing is required. If such a hearing is required, the parties are to identify the issues to be determined , and to provide an estimated length of hearing , and dates to avoid for such a hearing. The parties should be aware that the Employment Judge will be unable to participate in any such remedy hearing from 1 November for some 14 weeks or so, as he will then be engaged upon a long case from which he will be unable to re-list any remedy hearing until after its conclusion.

Employment Judge Holmes

Date: 29 September 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

30 September 2021

FOR THE TRIBUNAL OFFICE