Case No: 2408864/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr K Chima

Respondent: Iliad Solutions Ltd

Heard at: Manchester Employment Tribunal

On: 04, 05 and 08 November 2024

Before: Employment Judge M Butler
Ms K Fulton
Mrs C Titherington

Representation
Claimant: Self-representing
Respondent: Mr Sellwood (of Counsel)

JUDGMENT

It is the unanimous decision of the tribunal that:

1. The claim of automatic unfair dismissal fails and is dismissed.

2. The claims of having been subject to a detriment on the grounds of having made a protected disclosure fail and are dismissed.

3. The allegations of direct race discrimination fail and are dismissed.

4. The allegations of victimisation fail and are dismissed.

5. The allegations of harassment related to race fail and are dismissed.

6. For the avoidance of any doubt, all claims brought in this case fail and are dismissed.

REASONS

INTRODUCTION

7. The tribunal reserved its decision in this case following closing submissions on 08 November 2024. This is that reserved decision, with reasons. This includes all the reasons for the decisions, both substantive and procedural, that the tribunal was tasked with making during the hearing.

8. The claimant was employed by the respondent from 06 September 2021 as a Test Analyst, until his dismissal. He presented his claim form on 14 November 2022, alleging that he had been unfairly dismissed, been subjected to detriments on the grounds of having made a protected disclosure and for race discrimination.

9. The parties attended a Case Management Preliminary Hearing on 14 March 2023 with Tribunal Judge Overton. Following an application to amend the claim being successful, Judge Overton recorded the issues to be decided in this case. This list of issues covered all the matters contained within the claim form, as well as the claims brought by way of amendment (see pp.64-68).

10. For ease, the list of issues contained at the back of the case management orders was replicated by the respondent in a separate document (pp.68a-68e). The claimant confirmed that these remained the issues that he was asking the tribunal to determine at this hearing.

11. The tribunal was assisted by an agreed evidence file of documents that ran to 137 electronic pages (although internal pagination ran to only 130 pages). The file of documents and its index, the tribunal understood, had been completed and agreed at least 12 months before the first day of this hearing (and can only presume that it was in line with Judge Overton's direction for a copy of the agreed file to have been sent to the claimant by 06 June 2023). Despite a file having been agreed by the parties some time before, the claimant produced his own separate supplemental bundle. This was sent to the tribunal and the respondent's representatives at 05.26am on the morning of the first day of the hearing. This contained 20 pages. Mr Sellwood explained that although he considered it unhelpful that the claimant was producing a supplemental bundle so late on, he was not raising any formal objection to it being included in evidence. The tribunal allowed the supplemental bundle into evidence. The supplemental bundle largely contained screenshots of Teams chats between the claimant and Ms Mishra, and the claimant and Ms Shah.

12. The tribunal heard evidence from the claimant, who gave evidence on his own behalf. He did not call any additional witnesses.

13. The respondent called the following witnesses:

    a. Mr Alexi Karalis, who was a director of the respondent and the person who dismissed the claimant.

b. Mr Boyd, who was a Delivery Manager of the respondent, and who monitored the claimant's performance and who escalated the matter to Mr Karalis.
c. Ms Durgesh Mishra, who was the line manager of the claimant and to whom the claimant says he made a protected disclosure to.
d. Mr Mathew Nicholson, to whom the claimant says he made a protected disclosure.
e. Ms Frakhanda Shah, who was a Scrum Master for the respondent, and against whom the claimant alleges made racial remarks.

14. The tribunal did not consider the claimant to a reliable or credible witness. There were several reasons why the tribunal reached this conclusion:

a. The claimant would not concede on matters even where the evidence was entirely clear that he was incorrect. For example, when it was put to the claimant during cross examination that the phone call between himself and Ms Shah took place on 06 September 2024 rather than 07 September 2022, the claimant would not concede the date despite the evidence supporting that 06 September 2022 was the correct date (the claimant had accepted that the phone call took place during the Teams message conversation that took place on 06 September 2022).

b. When it was put to the claimant that p.102 of the bundle included suggestions of poor performance by him, the claimant raised for the first time that the documents may not be genuine and may have been manipulated, without anything to support such a contention.

c. The claimant maintained a claim that Ms Mishra made no contact with him beyond 08 September 2022. When cross-examined on that topic, the claimant first tried to re-focus his claim to Ms Mishra generally not contacting him. And when taken to the screenshot of message discussion between the claimant and Ms Mishra on 13 and 14 September 2022, the claimant suggested that he did not know who the conversation he was having was with. This is despite the claimant having agreed the bundle and index some 12 months before the hearing, and the conversation being identified as between the claimant and Ms Mishra. And a message attributed to the claimant commencing with 'Hi Durgesh…' (see p.117), with Durgesh being Ms Mishra's name.

d. The claimant brought this claim based on Ms Shah using seriously offensive racial slurs and he then raising this with Ms Mishra and Mr Nicholson. The claimant made bare assertions on these matters. And the evidence simply did not support these assertions.

e. Despite the claimant giving a version of events that were the opposite of that given by Mr Nicholson, the claimant did his best to avoid calling Mr Nicholson a liar or stating that he has lied. This was in the context of the claimant describing Mr Nicholson as his best friend in the workplace.

f. There were numerous occasions where the claimant was not answering the question being asked, but rather trying give an

answer to a question that had not been asked.

15. The tribunal did consider the witnesses of the respondent to be reliable witnesses of fact. Each gave clear and consistent evidence throughout and answered questions appropriately. Mr Boyd, for example, reflected on questions by the tribunal in respect of what evidence he had that there were concerns about the claimant's behaviour and/or performance. And responded by explaining that in hindsight he should perhaps of recorded such matters, especially given the seriousness of the consequences for the claimant.

16. Where there was a direct conflict of fact, and the tribunal had no other means of deciding a fact, the tribunal would prefer the evidence of the respondent witnesses.

17. During discussions at the start of the hearing, there was discussion around how the case would be timetabled. Mr Sellwood explained that he would require around 2 hours to cross-examine the claimant. The tribunal explained that the claimant would give his evidence on the afternoon of the first day. This would enable the tribunal to use the remainder of the first day of the hearing to read into the case (ie read the witness statements and evidence in advance of oral evidence). The claimant would cross examine the respondent's witnesses (save for Ms Shah) on day 2 of the hearing. Ms Shah was not available to travel to Manchester on day 2 of the hearing due to a hospital appointment and was intending on giving evidence in person at the hearing. Ms Shah was to give her evidence on the morning of day 3 of the hearing, with closing argument to be made in the afternoon of day 3.

18. However, due to the claimant not being in attendance on day 2 of the hearing (further details below), the tribunal gave permission for Ms Shah to give evidence by video link on the afternoon of day 2, after she had confirmed her availability. This was to ensure efficient and proportionate use of tribunal resource and was in furthering the overriding objective, in circumstances where the claimant's emails on 05 November 2024 indicated that he wanted the hearing to be postponed until 2025 and gave no indication of any intention to return.

19. Although the tribunal could have used its case management powers further, and heard closing argument on 05 November 2024, it decided to leave closing argument to take place on 08 November 2024, that being day 3 of the hearing. As this would give the claimant further opportunity to attend the hearing, at least to make what closing submissions he wanted to make, should he choose to. The claimant was written to on the afternoon of day 2 to confirm that this was the tribunal intention.

APPLICATION FOR SPECIFIC DISCLOSURE

20. The claimant did not raise any issues with the evidence file on the morning of the first day of the hearing during preliminary discussions. However, he made an application for specific disclosure during the morning of the first day by email, whilst the tribunal was reading into the case.

21. The claimant's application was for the removal of the redactions to the document at p.98 of the bundle.

22. The claimant's application was made in the following way:

    a. That the document references two individuals, himself and Ms Mishra, and that the document was a discussion about the dismissal of both.

    b. The claimant was dismissed but Ms Mishra was not and remains in employment with the respondent.

    c. The claimant accused Ms Mishra of incompetence in his grounds of claim.

    d. The claim concerns differential treatment on the grounds of race. And that when employees are performing below par they are offered rehabilitation or dismissal.

    e. He references Judge Overton's case management order, and particularly para 65 when recording direct race discrimination, where it is expressed 'The tribunal will decide whether the claimant was treated worse than someone else was treated'.

    f. In short, the claimant then explains that Ms Durgesh was in the same position as him, but was treated differently. The real difference being that he was male, Nigerian and a black African, and that Ms Mishra was female, Indian and possibly of British nationality.

    g. Ms Mishra continues to work for the respondent, and he was dismissed some two months after allegation of sub-par performance.

23. Mr Sellwood opposed the application on behalf of the respondent. He submitted the following:

    a. That in accordance with the principle laid down in **GE Capital Corporate Finance Group Ltd v Bankers Trust [1995]**, the respondent was entitled to redact irrelevant material.

    b. That although relevance is a factor when considering whether to order specific disclosure, it alone is not sufficient. And that specific disclosure must be necessary for the fair disposal of the hearing: **Canadian Imperial Bank of Commerce v Beck [2009] IRLR 740.**

    c. That the timing of the application was surprising given that the claimant had had the bundle for over a year.

    d. That the claimant has not established relevance, as the claimant has not brought dismissal as an act of discrimination.

    e. That the redacted parts concerned Ms Mishra. And that content was not necessary for the disposal of a fair hearing.

24. The tribunal considered the matter carefully. And refused to order that an unredacted version of the document be admitted into evidence. The reasons for this refusal were as follows:

    a. The claimant makes his application based on the treatment of him during dismissal when compared to Ms Mishra.

    b. The claimant's only dismissal complaint is that of automatic unfair dismissal, alleging that dismissal was on the grounds of him having made a protected disclosure.

    c. He brings no allegation that him being dismissed was an act of discrimination, nor was there an application to amend his claim to add such a complaint.

    d. The document at p.98 predates the claimant's alleged protected disclosures.

    e. There are no allegations of discrimination made against Mr Karalis or Mr Wright who are the individuals involved in the discussion.

    f. The tribunal concludes that the details behind the redactions cannot be relevant to the issues in this case and therefore refused the application, as they go to none of the complaints which the claimant brings as part of his claim.

CLAIMANT'S BEHAVIOUR AND NON-ATTENDANCE

25. On the morning of 04 November 2024, before the hearing commenced, the tribunal was made aware by security that the claimant, on entering the building, was being argumentative around the security checks that he was being required to comply with to enter the building and acting aggressively in challenging the security team's direction. Despite this, the claimant did eventually comply with what was being required of him and was allowed to enter the building. The tribunal's understanding was that the claimant was given a warning that his behaviour was unsatisfactory and that any further such behaviour will see him either removed from the building or refused further entry.

26. At the beginning of the hearing on 04 November 2024, the judge made the claimant aware that security had informed the tribunal of what they say had happened in security. The judge reminded the claimant of a need for satisfactory behaviour when attending the tribunal building, and that if security required him to comply with a specific security check, then he should do so. The claimant disagreed that he had acted unsatisfactorily when entering the building. The judge concluded this matter by informing the claimant that as far as the tribunal is concerned a line can be drawn under whatever has happened, and the case could commence.

27. In fairness to the claimant, the tribunal did not identify any behaviour by the claimant during 04 November 2024 that caused it any concern. The tribunal read into the case during the morning, and the claimant was cross

examined in the afternoon.

28. The tribunal notes two comments made by the claimant the during the hearing on 04 November 2024. When the claimant was being cross-examined, he raised for the first time the genuineness of two specific documents. When he was asked why this had not been raised before he explained that he had only read the bundle some 2 days earlier and had not read it all. And at the end of hearing on 04 November 2024, despite it having been explained earlier in the hearing the running order of the respondent witnesses and that the claimant would be cross-examining those witnesses, he passed comment that he was glad he wouldn't need to cross examine the witnesses of the respondent.

29. The claimant emailed the tribunal at 06.57 on 05 November 2024. He explained that he had initially refused to walk through the scanners by security staff on 04 November 2024. He explained that he was attending on 05 November 2024 and would be refusing to walk through the scanners twice unless they are activated. In short, this email confirmed that the claimant had refused to comply with that being asked of him by the Employment Tribunal's security team.

30. At the beginning of the hearing on the second day of the hearing, 05 November 2024, the tribunal was informed that the claimant had been refused entry to the tribunal building because of his behaviour when at security. In short, it was explained to the tribunal that the claimant refused to comply with the security protocols in terms of security checks and again became aggressive. After which the claimant tried to start recording the security staff on a mobile device. This led to the tribunal's security team refusing the claimant entry to the tribunal building and contacting 999. The claimant left the building and never returned.

31. The claimant was therefore not in attendance at the hearing on 05 November 2024.

32. The claimant was directed to contact the tribunal by 11.15am to discuss with the tribunal how it would proceed with the case. This could either by phone, email or by video link. And the claimant was informed that if there was no contact by the claimant by 11.15am then the tribunal would decide on how to proceed without his input. The tribunal arranged for a CVP room to be opened, for which the claimant was sent a link.

33. The claimant contacted the tribunal by email at 11.39, seeking a postponement of the hearing because of unreasonable refusal of his entry into the building. The claimant sent a second email at 11.53 explaining that he was now upset and not in the right state of mind to conduct a hearing and therefore it must be postponed.

34. The claimant did not call the tribunal nor enter the CVP room at any stage on 05 November 2024, before 16.00.

35. The tribunal refused the application to postpone the hearing in the circumstances. The claimant was warned of his conduct in the tribunal building and in proceeding through security and was aware that he could be refused entry to the building if he did not comply with the security

checks that were required of him. He then chose to act contrary to the advice he had received on 04 November 2024. His conduct was the reason behind his non-attendance. This was not an exceptional circumstance that would warrant postponing the hearing. The claimant could have returned to the tribunal building and sought entry into it by complying with the security checks or he could have attended by CVP.

36. Mr Sellwood invited the tribunal to dismiss the claim pursuant to Rule 47 of the Employment Tribunal Rules of Procedure 2013, considering the claimant's non-attendance. He submitted that doing so would be in accordance with the overriding objective, as to continue would increase costs to the respondent, that it would save tribunal resources that could be used for other parties, and that the claimant's behaviour would warrant such an approach. Mr Sellwood also submitted that the claimant's email in seeking a postponement further evidences him crossing over a line of conduct that would warrant dismissing the claim, in that he was trying to dictate to the tribunal what approach it should take and what timetable to impose by threats of complaints and appeals.

37. The tribunal considered the submissions of Mr Sellwood carefully. And although it appreciated some of the points being made by Mr Sellwood, it decided that it would proceed in the claimant's absence rather than dismiss the claim.

38. The tribunal's reasons for doing so were that the tribunal had already heard the claimant's evidence. The respondent witnesses were present, and there was facility to have Ms Shah appear remotely should she be available to do so. The tribunal was capable of putting the core facts of the claimant's case to each of the respondent witnesses. This would enable the tribunal to reach a decision through resolving the factual disputes that form the allegations in this case. In terms of the costs of having the hearing continue into Friday 08 November 2024, and the need for Ms Shah to attend in person on that day, the tribunal decided that Ms Shah could give evidence on 05 November 2024, if she was available to do so and she could do so by video hearing. It was also explained that the tribunal would not be using the flexibility afforded to the respondent in calling Ms Shah on the Friday (due to hospital appointments) as a reason to support dismissing the claim.

39. The tribunal also made it clear that it needed to avoid conflating matters that related to strike out pursuant to Rule 37 (particularly the conduct issues) and the principles under Rule 47.

40. The tribunal considered that a fair hearing could still take place in these circumstances despite the claimant's non-attendance. And therefore, decided to proceed in the claimant's absence rather than dismissing the case.

CLAIMANT'S EMAIL OF 06 NOVEMBER 2024

41. The claimant sent a further email to the tribunal at 13.50 on 06 November 2024. This email applies for an order that the hearing be declared a 'mistrial' and an application for the judge to recuse himself.

42. The claimant attended the hearing on 08 November 2024. The claimant was asked whether he wanted the tribunal to determine his applications as set out in his email, or whether there were further submissions he wanted to make. The claimant proceeded to repeat the contents of the email. When the judge interjected to remind the claimant that he did not need to repeat the contents of his email but was being asked whether he wanted to make any additional submissions, the claimant made allegations that the judge was seeking to prevent him from making his submissions. Despite the tribunal further inviting the claimant to make his submissions following this exchange, the claimant did not make any further submissions. However, when repeating his allegation that the judge was preventing him from making his submissions the claimant did refer to him not having expected a fair hearing given that the judge had sat and decided a previous case that he had brought before the employment tribunal. This was a further matter that the tribunal considered in determining his applications.

43. The tribunal's understanding is that these two matters overlap and are in effect one and the same. However, as they have been presented as two separate matters, these are addressed in turn below.

(i) Application that the hearing be declared a mistrial

44. The claimant makes this application on the basis that he considers it impossible that the tribunal would be able to put proper questions to the respondent witnesses without sufficient IT knowledge, as the alleged reason for dismissal is performance.

45. That there were exceptional reasons that justified an adjournment.

46. That the case was always going part-heard.

47. And that the claimant could have cross-examined all witnesses of the respondent in one day and that could have taken place on 08 November 2024.

48. The claimant also raises that Ms Shah was due to be cross-examined on 08 November 2024 and is raising the question as to why she was cross-examined on 05 November 2024.

Tribunal's decision

49. The tribunal's decision on the claimant's application to postpone the hearing is already addressed in this judgment. Disagreeing with a decision of the tribunal would not be a reason to abandon the hearing and have it start afresh. If the claimant disagrees with the decision and considers that the tribunal has made a legal error, then he can either apply for reconsideration of that decision or appeal the decision to the Employment Appeal Tribunal. The decision by the tribunal to refuse an adjournment on application by the claimant is taken no further here.

50. In terms of the claimant's suggestion that there has been some error by the tribunal in proceeding in his absence and putting the claimant's case to the respondent's witnesses, this is explicitly allowed for within Rule 47 of the Employment Tribunal's Rules of Procedure.

51. In terms of Ms Shah giving evidence on 05 November 2024, the tribunal has broad case management powers. Part of its powers include managing the hearing in accordance with the overriding objective. In circumstances where the claimant had been invited to contact the tribunal to engage in a discussion as to how the case would proceed but failed to do so. In circumstances where the claimant had not indicated a willingness to return to the hearing (either in person or remotely) either on 05 November 2024 or on 08 November 2024 in the emails received on 05 November 2024. And in circumstances where the claimant's emails of 05 November 2024 were such that the claimant was seeking to postpone the hearing until 2025, indicating that the claimant was no longer intending on attending the hearing during the trial window. The tribunal concluded that there would be no prejudice to the claimant of hearing from Ms Shah on the 05 November 2024, in those circumstances. In short, the claimant's contact with the tribunal suggested he was no longer attending the hearing during the trial window. The tribunal, applying its case management powers, decided to make efficient use of tribunal resource by inviting Ms Shah to give her evidence remotely on 05 November 2024.

52. The claimant has not identified any reason to support a 'mistrial'. Nor for the tribunal to abandon the hearing in some way and for the hearing to start afresh. This application therefore fails.

(ii) Application for Judge Butler to recuse himself

53. In respect of the claimant's application for Judge Butler to recuse himself, the claimant appears to make this application on the basis that the judge was not capable of effectively cross-examining the witnesses of the respondent. And on that basis the judge has compromised his duty of impartiality and was biased. The claimant also refers to there having been exceptional reasons that justified an adjournment, which also feeds into the claimant's suggestion of bias.

Tribunal's decision

54. The principles concerning recusal on the grounds of bias/lacking impartiality are set out in **Porter v Magill [2001] UKHL 67**. The test to be applied is "…. whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

55. The claimant has not particularised the grounds on which he says support that the judge has shown bias or acted without impartiality. Save for identifying that he disagreed with the tribunal's decision to not adjourn the hearing. And an additional allegation made at the hearing on 08 November 2024 that the judge had determined a previous claim he had brought, and his treatment at that hearing had meant that he was always going to be

treated unfairly at this hearing.

56. The claimant's application in does not satisfy the test laid down in **Porter v Magill and** is therefore refused. No matter has been put forward by the claimant which approaches the sort of material sufficient to require the Employment Judge to consider recusal on the grounds of the appearance of bias. The application is brought on disagreeing with the decision of the tribunal in refusing the application for adjournment, disagreeing with a decision that the judge reached on another occasion and disagreeing with the tribunal proceeding with the hearing in the claimant's absence pursuant to Rule 47 of the Employment Tribunal Rules of Procedure. None of these would lead to the judge recusing himself from these proceedings.

(iii) Request for a transcript

57. The claimant writes that '*I now request the Tribunal to immediately provide me with a transcript of the cross-examination of the Defendants witnesses of the 5/11/24.'*

58. Should the claimant require a transcript then there is further information contained in the notes at the end of this decision, which will take the claimant to the relevant Practice Direction.

59. For ease, the claimant would need to complete Form EX107 (available at Order a transcript of court or tribunal proceedings: Form EX107 - GOV.UK). However, the claimant should be aware that a fee will need to be paid.

CLAIMANT'S EMAIL ENGAGEMENT DURING THE PROCEEDINGS

60. The tribunal considered some of the correspondence by the claimant with the tribunal during the proceedings to fall below the acceptable standard of parties appearing in the tribunal. However, the tribunal did not consider this sufficient to use its own initiative to strike out the claim pursuant to Rule 37 of the Employment Tribunal Rules. In short, it was still possible for a fair hearing to take place. However, the tribunal considers it appropriate to record some of the references made by the claimant in emails as a record of his behaviour during these proceedings:

    a. On 05 November 2024 at 11.39, the claimant included the following comments:

        i. I have made my last attendance at that building. Any further hearings that I have at that Tribunal will be held over CVP.

        ii. They Respondents can now hold the remainder of the trial from the comfort of their offices.

        iii. I am determined to win my case and if the Tribunal makes any further decision adverse to me, then I will not only appeal it and bring a further lawsuit against my opponents, I will also make a complaint against Judge Butler who has

beforehand prejudiced my position in this case by taking an unprecedented 4hr break immediately at the start of the trial and an absence which he has failed to explain.

b. On 05 November 2024, at 17.42, the claimant included the following comments:

i. for the avoidance of doubt, I will not be attending final submissions for a cross-examination that I have not conducted and it is not up to the Tribunal to cross examine my opponents on my behalf.

ii. District Judge Butler can give my final submissions, I suppose? As he conducted the cross-examination and I have no idea as to what questions he asked so how could I make final submissions on a set of questions and answers that I know nothing about? lol....

iii. District Judge Butler's salary is tax-payer funded. I am a tax payer!

iv. District Judge Butler is simply **evil**, and I am convinced that he will never see my name again! NEVER!

v. I will now commence a separate lawsuit.

LIST OF ISSUES

61. The list of issues was confirmed at the beginning of the hearing as being the issues to be determined. For ease, these have been attached to the back of this decision.

LAW

62. This section provides a brief overview of the relevant law to be applied in this case.

(i) Public Interest Disclosure/Protected Disclosure

63. It is at s.43B of the Employment Rights Act 1996 (hereinafter 'ERA') where it is set out what is meant by a qualifying disclosure (relevant to the claimant's detriment claim and automatic unfair dismissal complaint):

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

64. In essence, what a tribunal must determine can be broken down into its constituent parts:

    a. Did the claimant disclose any information?
    b. If so, did the claimant believe, at the time they made the disclosure, that the information disclosed was in the public interest and tended to show one of those matters listed in s.43B(1) ERA?
    c. If so, was that belief reasonable?

(ii) Automatic unfair dismissal

65. Section 103A ERA provides that '[a]n employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

66. The burden of proof rests on a claimant to establish that the reason, or principal reason, for the dismissal was because they made a protected disclosure, where the claimant does not satisfy 2 years continuous service.

(iii) Detriment on the grounds of having made a protected disclosure

67. Under section 47B ERA:

"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

68. Section 47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the

employer's treatment of the whistleblower, see **Fecitt v. NHS Manchester [2012] IRLR 64**.

69. The meaning of detriment for the purposes of public interest disclosure claims, although undefined in the Employment Rights Act 1996, closely mirrors that adopted under Equality legislation. A detriment thus will be taken to exist if a reasonable worker would or might take the view that the action or inaction of their employer was in all the circumstances to his detriment: **Ministry of Defence v Jeremiah 1980 ICR 13**, CA and **Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337, HL.

It is provided by s.48(2) ERA, where a claim under s.47B is made, that "it is for the employer to show the ground on which the act or deliberate failure to act was done".

Harassment related to race

70. Protection against harassment is provided for at s.26 of the Equality Act 2010:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

Direct race discrimination

71. Protection against direct discrimination is provided for at s.13 of the Equality Act 2010:

> 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.

72. Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** gave guidance as to the approach an employment tribunal should consider when determining a direct discrimination complaint:

> "7. …In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.
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> 8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.
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> …
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> 11. …employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

73. This is further explained by Mr Justice Underhill P (as he then was), in **Amnesty International v Ahmed [2009] IRLR 884:**

> "32. The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of.[3] That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives: see, e.g., art. 2.2 (a) of Directive EU/2000/43 ("the Race Directive"). There is however no difference between that formulation and asking what was the "reason" that the act complained of was done, which is the language used in the victimisation provisions (e.g. s. 2 (1) of the 1976 Act): see *per* Lord Nicholls in **Nagarajan** at p. 512 D-E (also, to the same effect, Lord Steyn at p. 521 C-D).[4]
>
> 33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. **James v Eastleigh** is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the Council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The Council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p. 772 C-D), "gender based".[5] In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in **James v Eastleigh** decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.
>
> 34. But that is not the only kind of case. In other cases – of which **Nagarajan** is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the

ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in **James v Eastleigh**, a benign motive is irrelevant. This is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in **Nagarajan** (see para. 29 above). The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear.

…

37. …although (as Lord Goff points out) the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else – all that matter is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

(iv) Victimisation

74. Section 27 of the Equality Act 2010 states that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

…

(c) Doing any … thing for the purposes of or in connection with the EqA 2010.

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(v) Burden of proof under the Equality Act 2010

75. We reminded ourselves of the burden of proof in discrimination cases, with

reference to section 136 of the Equality Act 2010:

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

76. Lord Justice Mummery (with which Laws and Maurice Kay LJJ agreed) in **Madarassy v Nomura International plc [2007] ICR 867**, at paragraphs 56-58, provided a summary of the principles that apply when considering the burden of proof in Equality Act Claims:

> "56. The court in *Igen v Wong…* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
>
> 57. "Could… conclude" in section 63A (2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.
>
> 58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-

discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

77. Mummery LJ also explained further how evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (paras. 71-72):

> "71. Section 63A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.
>
> 72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground…."

78. Lord Justice Mummery also pointed out that it will often be appropriate for the tribunal to go straight to the second stage. An example is where the employer is asserting that whether the burden at the first stage has been discharged or not, he has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by that approach since it is effectively assumed in his favour that the burden at the first stage has been discharged.

79. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant succeeds in doing this, then the onus will be on the respondent to prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment.

CLOSING SUBMISSIONS

80.. The tribunal heard oral closing argument from Mr Sellwood. Although not repeated here, they have been considered in making this decision.

81. The claimant was informed by the tribunal on 05 November 2024 that closing argument would be taking place on the morning of 08 November 2024 by video. And that he was still permitted to attend to give closing argument if he wanted to. However, that if he was not present by 10am on that day, the tribunal would be proceeding in his absence. The claimant responded to the tribunal by email on 05 November 2024 at 17.42. Amongst other things, he explained that he would not be attending on 08 November 2024. However, despite this email, the claimant did attend at the video hearing on the morning of 08 November 2024. The claimant informed the tribunal that he would not be making closing submissions but had attended for the purposes of hearing the tribunals answers to the questions he had raised in his email of 06 November 2024 (addressed above). The claimant disconnected from the hearing after the tribunal gave its oral reasons addressing the applications he had made in his email of 06 November 2024. The tribunal did not hear closing argument from the claimant.

FINDINGS OF FACT

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

82. The claimant was employed by the respondent from 06 September 2021 as a Test Analyst.

83. On 04 July 2022, Mr Karalis had a Teams message conversation with Mr Wright. During which he explained that ‘We need to let [the claimant] go as well, he is lazy and doesn’t perform…’ (p.98 and para 12 of Mr Karalis’s witness statement).

84. Mr Karelis made a final decision to dismiss the claimant on or around 16 August 2022 (para 12 of Mr Karalis’s witness statement). There was a delay in actioning the dismissal as Mr Karelis wanted to take legal advice on the practicalities of the dismissal (para 13 of Mr Karalis’s witness statement). The tribunal had no reason to doubt the evidence of Mr Karalis, which remained consistent when questioned. There was no evidence presented to the contrary and nothing that supported that the decision to dismiss the claimant was made at a later date.

85. On 06 September 2022, there was chat on Teams between the claimant and Ms Shah. This concerned what work the claimant was doing that day (p.111).

86. At 17.35 on 06 September 2022, Ms Shah asked the claimant to tell her

what work Ms Mishra had told him to work on that morning, to which the claimant replied 'Nothing specifically'. In response to the claimant's reply, Ms Shah called the claimant.

87. During the phone call between the claimant and Ms Shah at 17.36 on 06 September 2022, the tribunal makes the following findings:

    a. Ms Shah repeated the question she had asked the claimant in the chat, namely why he had not picked up a ticket to work on and explained to the claimant the expectations the respondent had of him in doing work, and an expectation that he does a full days work.

    b. The claimant raised his voice and was shouting and used words to the effect that Ms Shah was not the claimant's dad and could not tell him what to do, and that servants were treated better back in the claimant's hometown.

    c. Ms Shah did not describe the claimant as a 'Fucking lazy Nigger'.

    d. Ms Shah did not state that 'Black people were the laziest people she has ever worked with'.

    e. Ms Shah did not talk down to the claimant and make him feel unwelcome.

    f. Ms Shah did not inform the claimant that she intended to get the claimant sacked.

    g. Ms Shah did not allege that the claimant was frequently missing and AWOL from work.

    h. Ms Shah ended the phone call due to the manner of the claimant's actions.

88. The tribunal preferred the evidence of Ms Shah in respect the phone call that took place on 06 September 2022 between herself and the claimant. In making this finding, the tribunal considered the actions of the claimant and Ms Shah following the phone call to be important:

    a. The claimant sent a message to Ms Shah at 17.51 (p.111), which was some 5 or 10 minutes after a phone call in which the claimant alleges that Ms Shah had directed racially derogatory slurs toward him. This message was simply a continuation of the conversation concerning assigning of work. The claimant's message is consistent with Ms Shah's evidence on the content of the phone call. There is no reference by the claimant to any inappropriate behaviour on behalf of Ms Shah during the phone call that had just taken place.

    b. The claimant sent a message to Ms Shah on 08 September 2022 at 13.57 (p.112). This concerns a work issue and again there is no reference by the claimant to any inappropriate behaviour on behalf of Ms Shah during the phone call.

    c. Ms Shah replied to the claimant at 14.14. It is Ms Shah that raises

the phone call and explained that the claimant had been disrespectful during it and that his behaviour was unacceptable.

d. The claimant replied to Ms Shah at 14.24 and 15.37 in respect the phone call. He responded by alleging that Ms Shah was disrespectful during the call. He explained across these two messages why he considered Ms Shah to be disrespectful during it. At its height, the claimant refers to Ms Shah as having spoken down to him and having called him outside of his work hours. At no stage does he refer to racial slurs or racially derogatory language having been used. So, despite explaining in his messages what he considered was wrong with Ms Shah's behaviour during the phone call, even if the claimant was correct in what he had written, he makes no reference to the serious racial slurs that he now brings this claim on.

e. In the claimant's message at 15.37, the claimant references Ms Shah not being his dad, and that if he was Ms Shah's house cleaner and she spoke to him that way then he would resign. This is broadly consistent with Ms Shah's recollection of the phone call.

f. After having received his termination letter dated 14 September 2022, which references that termination was due to the claimant not having met the required expectations of the business and unsatisfactory performance, the claimant sent an email on 20 September 2022 making a request for the details of his performance evaluation (p.81). Again, there is no reference in this email to the matters that the claimant says were the reason behind his dismissal.

g. Given the above, the tribunal preferred the evidence of Ms Shah and made the findings accordingly.

89. There was no phone call between the claimant and Ms Shah on 07 September 2022. It was unclear based on the claimant's evidence whether he was maintaining that the phone call between himself and Ms Shah took place on 07 September 2022 (see para 30 of the claimant's witness statement). The claimant's oral evidence of confirming that the phone call took place during the Team chat with Ms Shah on p.111, and that there was no further Teams chat he was referring to, led the tribunal to this finding.

90. There was a phone call between the claimant and Mr Nicholson on 08 September 2022, at around 09.38am (see p.121). The claimant confirmed in oral evidence that it was this phone call that he was referring to as the one in which he made protected disclosures. The tribunal preferred the evidence of Mr Nicholson in respect of the content of this phone conversation and that the conversation was focused solely on work query. This is consistent with the Teams messages on pp.121-124. The claimant asks Mr Nicholson whether he has five minutes for a call at 09.37. Mr Nicholson confirms he does. And at 09.55, Mr Nicholson sends the claimant a message to confirm that he was available. Following the phone call the messages that follow focus solely on work issues and a piece of coding. The tribunal concludes that the phone call, consistent with Mr

Nicholson's evidence, was about a work issue only, and which continued by message between the two. Further, given our finding above, there was nothing to disclose to Mr Nicholson about the 06 September 2022 phone call.

91. For the avoidance of doubt, the claimant did not call Mr Nicholson on 08 September 2022 and report to him that during a phone call between himself and Ms Shah, Ms Shah had stated the following:

    a. The claimant was a 'Fucking lazy Nigger'.

    b. Black people were the laziest people she had ever worked with.

    c. Ms Shah talked down to the claimant and make him feel unwelcome.

    d. She intended to get the claimant sacked.

    e. The claimant was frequently missing and AWOL from work.

92. The claimant did not call or message Ms Mishra on 08 September 2022 and report to her that during a phone call between himself and Ms Shah, Ms Shah had stated the following:

    a. The claimant was a 'Fucking lazy Nigger'.

    b. Black people were the laziest people she had ever worked with.

    c. Ms Shah talked down to the claimant and make him feel unwelcome.

    d. She intended to get the claimant sacked.

    e. the claimant was frequently missing and AWOL from work.

93. Nor did the claimant request details of how to raise a formal complaint from Ms Mishra. Given the tribunal's finding that the conversation between the claimant and Ms Shah did not include the content as alleged by the claimant, the tribunal concludes that there was no such matter to raise with Ms Mishra and therefore made these findings accordingly. And further, the claimant had further engagement with Ms Mishra on 13 and 14 September 2024 (see below) and did not follow up to enquire as to where the details of how to make a formal complaint were. And if he had made this request, it is implausible that he would not have followed this up during this discussion.

94. The claimant at no point raised a complaint about Ms Shah's conduct to anybody with the respondent.

95. There were discussions between the claimant and Ms Mishra on 13 September 2022 and 14 September 2022 (pp.116-118). The claimant at this hearing for the first time raised that he was not sure who these messages were between. This was despite the file and the index having been agreed over 12 months prior to the hearing. The tribunal concludes

that on balance these were messages being sent between the claimant and Ms Mishra. Ms Mishra was the claimant's line manger and was involved in allocating work to the claimant. The messages on pp.116-118 revolve around work allocation and supports that these were messages being sent between the claimant and Ms Mishra. Further, the claimant at p.117 starts the final message with 'Hi Durgesh…', and this is Ms Mishra.

96. On 13 September 2022, Mr Karalis sent the claimant an email inviting him to a meeting in-person in Leeds (p.127). This was entitled meeting with Alexi. However, this was a meeting being arranged at which the claimant would be dismissed, following the decision that had been reached on 16 August 2022 and Mr Karalis having taken legal advice on the practicalities.

97. The claimant responded to the invite that same day querying what the meeting was about. This was in the context of it being a long distance for him to drive. The claimant suggested talking over the phone, which Mr Karalis agreed to, with this due to take place on 14 September 2022 at 11am (see p.115a, para 41 of the claimant's witness statement and para 13 of Karalis's witness statement).

98. At around 08.30am on 14 September 2022, before the meeting had taken place, Mr Karalis emailed the claimant a copy of his termination letter. Mr Karalis amended his witness statement at the hearing and accepted that he had sent this in advance of the meeting. The tribunal accepts the claimant's evidence in respect of the time at which this was sent to him (see para 43 of the claimant's witness statement).

99. The claimant accepted under cross-examination that Ms Shah had not failed to attend weekly meetings at which work would be allocated to him, as no such meetings existed. He explained that he was referring to daily meetings. And so we make that finding.

CONCLUSIONS

100. The tribunal reaches a specific conclusion in this case that the claimant has told deliberate untruths in relation to what happened on the 06 September 2022 and the use of racially harassing language by Ms Shah, and in him then raising these matters with Ms Mishra and Mr Nicholson on 08 September 2022. The allegations concern the use of some seriously offensive racial language. And yet the evidence of what happened following the phone call, including his own contact with Ms Shah on 08 September 2022, does not support that such offensive racial language was used. And that is because such language was not used. The claimant knows that such language was not used. And yet he brought this claim based on such language. The claimant's allegation as to the content of the phone call between him and Ms Shah has been rejected as false.

101. Given the tribunal's findings above, Ms Shah did not subject the claimant to the comments as alleged on either 06 or 07 September 2022. Consequently, his allegations of direct race discrimination and harassment related to race, insofar as Ms Shah saying to the claimant that he was a 'Fucking lazy Nigger' and that black people were the laziest people she

had ever worked with on 06 or 07 September 2022 must fail and are dismissed.

102. Given the tribunal's findings above, the claimant has not satisfied the tribunal that he made disclosures of information as alleged to either Ms Mishra or Mr Nicholson on 08 September 2022. He therefore has not made a public interest disclosure as alleged. Nor has he done a protected act as alleged, for the purposes of his victimisation complaints. His claims of automatic unfair dismissal, detriment on the ground of having made a protected disclosure and victimisation complaints fail in their entirety and are dismissed.

103. Given the tribunal's findings that the claimant did not make a compliant about Ms Shah to either Ms Mishra or Mr Nicholson, or anybody else, there was nothing to investigate. And therefore, the allegation of direct race discrimination, insofar as it relates to a failure to investigate complaints about Ms Shah also fail and are dismissed.

104. Furthermore, the tribunal made a finding that the decision to dismiss the claimant crystalised on 16 August 2022, a decision made by Mr Karalis, which is in advance of any alleged public interest disclosures. And therefore, any such disclosure could not have been the reason or principal reason behind the decision to dismiss the claimant. And the automatic unfair dismissal complaint would have failed for that reason in any event.

105. The claimant conceded that there were no weekly meetings that took place, which Ms Shah had failed to attend. And the tribunal found that that Ms Mishra had engaged with the claimant through messages on 13 and 14 September 2022.So even had the claimant established that he had made public interest disclosure or done a protected act, the detriment claims brought on the grounds of having made a public interest disclosure and/or for having done a protected would still have failed as the tribunal would have concluded that he had not been subjected to the detriments as alleged.

106. In line with the overriding objective, and approaching these reasons proportionally, the tribunal does not consider it necessary to conclude on whether the claimant was dismissed for capability or performance reasons, on whether the claimant disclosed information that satisfied the test of being a protected disclosure or on whether there was some causal link between the alleged detriments and the alleged protected disclosure/protected act and/or the protected characteristic of race.

Employment Judge **M Butler**

Date: 08 November 2024

JUDGMENT SENT TO THE PARTIES ON

Date: 18 November 2024

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FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

AUTOMATIC UNFAIR DISMISSAL (section 103(a) Employment Rights Act 1996 ("ERA 1996")

1. Was the reason or principal reason for dismissal that the Claimant made a protected disclosure?
If so, the Claimant will be regarded as unfairly dismissed.

2. The Claimant contends the protected disclosures were the Claimant's disclosures to Durgesh Mishra (Test Team Lead) and Matthew Nicholson (Senior Developer) of the Respondent Company on 8 September 2022 when he complained about harassment, that:

a. Ms Shah has said on 7 September 2022, "Fucking lazy nigger" and "Black people were the laziest people [she] has ever worked with";

b. That Ms Shah had talked down to the Claimant and made him feel unwelcome;

c. That Ms Shah had said on 7 September 2022 that she intended to get the Claimant sacked;

d. That Ms Shah had alleged on 7 September 2022 that the claimant was frequently missing and AWOL from work.

3. Do(es) the Claimant's disclosure(s) amount to a qualifying protected disclosure for the purposes of Section 43B of the ERA 1996?

4. If yes, did the Claimant reasonably believe that the disclosure(s) were in the public interest?

5. The Claimant contends the disclosures tend to show:

a. (that a criminal offence has been committed or is likely to be committed,

b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

DETRIMENT

6. If yes to the above, was the Claimant subjected to a detriment on the grounds that he had made a disclosure?

7. If yes, what are those detriments?

8. The Claimant contends those detriments were:

a. Ms Shah failing to attend weekly meetings with the Claimant at which the Claimant would have been allocated work;

b. Durgesh Mistra's failure to respond to the Claimant request of 8 September 2022 for information on how to raise a formal complaint about Ms Shah's behaviour on 7 September 2022 and

c. Durgesh Mistra failing to make any further contact with the Claimant following the disclosure of 8 September 2022.

DIRECT DISCRIMINATION

9. The Claimant is Black African and Nigerian.

10. Did the Respondent do the following things:

a. On 7 September 2022 Ms F Shah (Project Coordinator) call the Claimant and say:

i. "Fucking lazy nigger" and

ii. "Black people were the laziest people [she] has ever worked with"

b. Failing to investigate the Claimant's complaints about Ms Shah, which the Claimant alleges he made on 8 September 2022.

11. Was that less favourable treatment?

12. If so, was it because of race?

13. If disputed: Did the Respondent's treatment amount to a detriment?

VICTIMISATION

14. Did the Claimant do a protected act as follows:

a. On 8 September 2022, inform Durgesh Mistra (Test Team Lead) and Matthew Nicholson (Senior Developer) of the Respondent Company on 8 September 2022, that:

i. Ms Shah has said on 7 September 2022, "Fucking lazy nigger" and "Black people were the laziest people [she] has ever worked with";

ii. That Ms Shah had talked down to the Claimant and made him feel unwelcome;

iii. That Ms Shah had said on 7 September 2022 that she intended to get the Claimant sacked;

iv. That Ms Shah had alleged on 7 September 2022 that the claimant was frequently missing and AWOL from work.

15. Did the Respondent believe that the Claimant had done or might do a protected act?

16. Did the Respondent do the following things:

a. Ms Shah failing to attend weekly meetings with the Claimant at which the Claimant would have been allocated work;

b. Durgesh Mistra's failure to respond to the Claimant request of 8 September 2022 for information on how to raise a formal complaint about Ms Shah's behaviour on 7 September 2022 and

c. Durgesh Mistra failing to make any further contact with the Claimant following the disclosure of 8 September 2022.

17. By doing so, did it subject the Claimant to a detriment?

18. If so, was it because the Claimant did a protected act?

19. Was it because the Respondent believed the Claimant had done or might do, a protected act?

HARASSMENT RELATED TO RACE (section 26 EqA 2010)

20. The Claimant's race is Black African and Nigerian.

21. Has the Claimant been subject to the following conduct as alleged:

a. On 7 September 2022 Ms F Shah said:

i. "Fucking Lazy Nigger" and;

ii. "Black people were the laziest people [she] has ever worked with" .

22. Has the Claimant established on the balance of probabilities that the conduct at the paragraph 21 above, occurred as alleged?

23. If so, was such conduct unwanted?

24. If so, can that conduct in paragraph 1 above be said to have had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment, for the Claimant?

25. If not, did it have that effect? If yes, was it reasonable to for the conduct to have the perceived effect.

26. If so, was the conduct related to the Claimant's race?

REMEDY

27. If the Tribunal finds the Claimant was unfairly dismissed, does the Claimant wish to be reinstated or re-engaged? Should the Tribunal order reinstatement or re-engagement?

28. If the Tribunal finds the Claimant was unfairly dismissed, what award should be made?

29. If the Claimant were unfairly dismissed, would it be just and equitable in the circumstances for the Tribunal to make a compensatory award? And if so, for how much?

30. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the Claimant be

compensated?

31. If the Tribunal finds the Claimant's dismissal was unfair, should any compensation be reduced subject to Polkey v AE Dayton Service Ltd [1987] to reflect the fact the Claimant would have been dismissed in any event?

32. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the Respondent comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

33. If the Tribunal finds the Claimant was dismissed unfairly, did the Claimant's conduct contribute to the dismissal? And if so, should any award of compensation be reduced by 100% to reflect contributory fault?

34.

35. What injury to feelings has any detrimental treatment arising from a protected disclosure caused the Claimant and how much compensation should be awarded for that?

36. Has any detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

37. Is it just and equitable to award the Claimant other compensation?

38. Did the Claimant cause or contribute to any detrimental treatment by their own actions and if so would it be just and equitable to reduce the Claimant's compensation? By what proportion?

39. Was any protected disclosure made in good faith? If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

40. If the Tribunal find the Claimant was subject to discrimination, what compensation, if any, should be awarded? In particular:

a. How did the Respondent's treatment impact the Claimant?

b. What injury to feelings, if any, was there?

c. Is the Claimant entitled to other financial losses?

d. Has the Claimant sought to sufficiently mitigate any losses arising?

e. Is it just and equitable to increase or decrease any award payable to the Claimant?

f. Should interest be awarded? How much?