



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr R Parkinson

and

Respondent

GI Group Recruitment Limited

**Held at Reading (by CVP
video link) on**

Hearing – 25, 26, 27, 28 January 2022

In Chambers (without parties) – 7 February 2022

Representation

Claimant: In person

Respondent: Mr I Wheaton, counsel

Employment Judge
Vowles

Members: Mr P Hough
Mr T Poil

UNANIMOUS RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Direct Race Discrimination – section 13 Equality Act 2010

2. The Claimant was not subject to direct race discrimination. This complaint fails and is dismissed.

Race Related Harassment – section 26 Equality Act 2010

3. The Claimant was not subject to race related harassment. This complaint fails and is dismissed.

Victimisation – section 27 Equality Act 2010

4. The Claimant was not subject to victimisation. This complaint fails and is dismissed.

Unfair Dismissal - section 98 Employment Rights Act 1996

5. The Claimant was dismissed on 25 November 2019 and that was the effective date of termination. The dismissal was unfair. This complaint succeeds.

Unauthorised Deduction from Wages - section 13 Employment Rights Act 1996

6. This claim will be considered at the remedy hearing yet to be listed.

Remedy Hearing

7. The case will now be listed for a hearing to determine the appropriate remedy for unfair dismissal and to consider the claim for unauthorised deduction from wages.

Reasons

8. This judgment was reserved and written reasons are attached.

Public Access to Employment Tribunal Judgments

9. The parties are informed that all judgments and reasons for judgments are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the Claimant and Respondent.

REASONS

Submissions

1. On 24 February 2020 the Claimant presented complaints of direct race discrimination, race related harassment, victimisation, unfair dismissal and unauthorised deduction from wages.
2. On 24 March 2020 the Respondent presented a response. All claims were resisted.
3. On 13 April 2021 at a Tribunal preliminary hearing the claims and the defences were clarified and set out in a case management order.
4. The list of claims pursued by the Claimant and which fall to be determined by this Tribunal were as follows:
 - Direct race discrimination – Section 13 Equality Act 2010

- Race related harassment – Section 26 Equality Act 2010
- Victimisation – Section 27 Equality Act 2010
- Unfair dismissal – Section 98 Employment Rights Act 1996
- Unauthorised deduction from wages – Section 13 Employment Rights Act 1996

Evidence

5. The Tribunal heard evidence on oath from the Claimant, Mr Ryan Parkinson (Assembly Worker).
6. The Tribunal also heard evidence on oath from the following witnesses on behalf of the Respondent:
 - Ms Sally Charlton (Operations Manager)
 - Ms Rachel Keen (Senior Accounts Manager)
 - Ms Kim Lowe (Accounts Manager)
 - Ms Toni Shirley (HR Business Partner and first dismissing officer)
 - Mr Andy Elmore (Operations Support Manager and second dismissing officer)
 - Ms Helen Davies (Diversity and Inclusion Manager and second appeal officer)
7. The Tribunal also read a witness statement from Mr Andy Greig (Operations Director and first appeal officer) who did not attend the hearing but the Tribunal decided to take account of the contents of his statement and give it such weight as it considered appropriate in the circumstances.
8. The Tribunal also read documents in a bundle of documents provided by the parties amounting to 435 pages.
9. The Tribunal also took account of written closing submissions by both parties.
10. From the evidence heard and read the Tribunal made the following findings of fact.

Findings of Fact

11. The Respondent is an employment business which provides temporary labour to a large number of clients including BMW at their Oxford Plant which produces the Mini. BMW is the client of the Respondent.

12. The Claimant was employed by the Respondent on 20 January 2014 as a Production Operative/Assembly Worker to work on the production line of the Mini for the client until his final dismissal on 25 November 2019.
13. On 13 October 2017 the Claimant submitted a written grievance alleging that a colleague, SW, was guilty of race discrimination against him.
14. The Claimant is black of African national origin.
15. The grievance included the following:

"I would like to bring to your attention the issue I have with one of your colleagues (SW). It's been more than two times we have confronted each other and the way she spoke to me was totally unacceptable. I personally think she has got problems with black people and I feel I am one of them... I have not long ago got rewarded with a certificate with a thank you for doing a good job, my attendance is good as well. So I don't understand why I am being victimised and discriminated against and she always addresses me with anger...."

16. On 17 October 2017 there was an incident involving the Claimant and a BMW manager (PH) in which the Claimant alleges that he was assaulted. The particulars of claim stated:

"17 October 2017. Assaulted by my manager, I got punched in my chest by my manager because I put in a grievance about the woman named (SW) racial discrimination because she just started working at BMW and started making my life a misery by always looking for ways to get me into trouble working together with my managers and union...."

I gave in my grievance to a union member I can trust they handed it to G1 Group and soon as it got put into their hands the same day the manager comes upstairs at 7.30am and assaulted me how he knew about my confidential information I don't know because I never told a word to no one."

17. On 2 November 2017 the Claimant presented a written grievance about the alleged assault. It included the following:

"I am writing this letter to lodge a formal complaint against BMW worker (PH). I feel that I have been bullied, victimised and being given unfair treatment because I am black. I feel that I am being discriminated against by (Mr PH) based on my race because I have been treated

differently to my white colleagues. It is a problem that is causing me some concern and that I have been unable to solve without bringing to your attention. I hope in doing so we can deal with the issue.

On 17 October I got assaulted by my manager which he punched me in my chest over a grievance I put in against a lady that works for GI Group. I also have witnesses to come forward to say this is what happened..."

18. On 9 January 2018, following a grievance hearing on 22 November 2017, Ms Charlton informed the Claimant in writing that his grievance had not been upheld. She concluded that there was insufficient evidence to support the allegations.

19. On 17 June 2018 Mr AG (BMW Supervisor) submitted a "Notification of Incident" report alleging that the Claimant was "missing off site" during Sunday night overtime. The report included the following:

"Associate disappeared during a TPM Sunday overtime shift. Went missing at 19.50 and returned about 20.45 with a Burger King. Associate had not asked for permission or had noted anyone in his team that he was leaving. The agreed break time was 20.45 and was arranged with him present at 19.45. All other members of the team continued to work carrying out TPM tasks but unhappy their colleague had left them to do the task without him increasing their workload. During his period of absence myself and the shift TPL had searched the restrooms and smoking areas to ensure he was not in the building in case of a fire alarm. After being confronted by the shift TPL Ryan was upset and decided he did not wish to be here anymore and went home at 21.45."

20. On 20 June 2018 the Claimant was interviewed about the incident. The record of interview includes the following account by the Claimant:

"We finished the cell at around 19.50 we were saying that what we doing about food everyone wanted a kebab and I said I wanted a Burger King. My TC was talking to (D) about what they were going to get (S and B) were discussing what they ordered I said I'm going to get a Burger King I got on a scooter thing and went and got a Burger King sat in my car till half past. I rang (B) at 20.23 and 20.28 to ask what was going on. He replied that they made us work through break as the kebab had not come yet. After I spoke I picked up what I had left from the Burger King and came inside looking for everyone. I could not find

them. At say 8.38 (S) asked where I had been had been looking for me I said that I went on my break and went to get Burger King and came back. He said that I should have notified someone, I said I did, I did when they were ordering food. After that he said he was going to write a letter to HR to state that I went off campus without asking permission. I went back to work after left after an hour but I was not happy as another guy (S) had gone missing for over an hour and no one went looking for him. Was on a different day....

Please confirm that you admitted to your manager that you left the site on Sunday 17 June 2018? The Claimant - Yes I said that at the start I went to Burger King.”

21. On 22 August 2018 the Claimant was interviewed about the alleged unauthorised absence.
22. On 23 August 2018 the Claimant was signed off work with stress at work and anxiety by his GP for four weeks.
23. In early September 2018 the Claimant presented a grievance about treatment by his managers at BMW and G1. This delayed the disciplinary process regarding his alleged absence. He was then again signed off work by his GP for stress at work and anxiety for further periods until February 2019.
24. On 19 December 2018 Ms Keene wrote to the Claimant with the outcome of her investigation into his grievance. She concluded that she could find no evidence that people were working against him, or that he was being bullied, victimised and unfairly treated or being treated like that because he was black. The grievance was therefore not upheld. The Claimant appealed against the outcome but his appeal was not upheld.
25. The Claimant’s grievance and grievance appeal having been not upheld, on 26 April 2019 the disciplinary proceedings regarding the alleged absence on 17 June 2018 were resumed. The letter included the following:

“It has been brought to my attention that you were missing during your shift on 17 June 2018 in which an allegation was raised where you left site without permission on 27 July 2018 you had an unauthorised absence prior to annual leave following your absence on 22 August 2018 you failed to participate in the investigation being conducted and an allegation was raised into your behaviour and conduct which was

perceived as threatening and intimidating towards G1 Group and BMW, from which I have enclosed the notes, I have considered the allegation and have decided that it is appropriate to discuss these further at a formal disciplinary hearing.”

26. The disciplinary hearing took place on 8 May 2019 conducted by Ms Shirley. The hearing was then adjourned to a later date.
27. In the meantime, on 15 May 2019, the Claimant was subject of a further “Notification of Incident” of “Leaving site without prior permission” on 13 May 2019 by Mr TC, a Manager.
28. On 15 May 2019 the earlier disciplinary hearing conducted by Ms Shirley was resumed and at the end of that hearing the Claimant was summarily dismissed. The Tribunal could not find a dismissal letter in the bundle but in the notes of the meeting it is recorded that Ms Shirley said:

“Moving back to this meeting after considering the information relating to the incident when you left site without permission on 17 June 2018. The decision is that I am going to dismiss you with immediate effect. You do have the option to appeal within five days. You will be required to leave site immediately and will be escorted by security.”

29. On 17 June 2019, an appeal hearing was held and on 20 June 2019 the appeal officer, Mr Greig, overturned the decision to dismiss and replaced it with a final written warning. The letter included:

“Thank you for attending the appeal meeting on Monday 17 June 2019. You were appealing against our decision to terminate your employment on the grounds of gross misconduct on 15 May 2019 due to leaving the BMW site without permission.

I have carefully considered all the prior evidence and statements and I have taken into consideration the information provided by yourself and (RH) during the appeal hearing.

What is absolutely clear is that it is a breach of the policy of both G1 Group and BMW to leave the site without permission. This is stated in the G1 Group Employee Handbook and was shown to you at the appeal hearing. The statements that we have taken from your work colleagues all indicate that permission was not given in this instance. Therefore our initial decision was made within the correct employee guidelines.

However I have considered the details provided at the appeal hearing regarding the events on the day and as such I am prepared to overturn the original decision to terminate your employment. In this instance I will apply the decision of final written warning. For avoidance of any doubt, your contract is not terminated and you now have a final written warning that will be kept on file for a period of 12 months from 15 May 2019.

This is the final decision on the matter and I trust you are satisfied with the decision. I will be in touch in due course to discuss your current employment going forward.”

30. The Claimant returned to work on 8 July 2019 and was immediately suspended by Ms Edmunds for the following reasons:

“Further to our meeting today I can confirm that the following allegation has been made:

- You left site without permission on 13 and 14 May 2019 - this could result in a breakdown of trust and confidence in you from G1 Group and BMW,*

G1 Group regards such allegations as gross misconduct. Consequently in accordance with the terms of G1 Group’s Disciplinary Policy I am writing to give you notice that you are suspended with immediate effect from all official duties on full pay until further notice.”

31. On 10 July 2019 the Claimant presented a written grievance about several matters including the final written warning, the suspension on 8 July 2019 in general terms about the way he had been treated by his managers. The grievance included the following (paragraphs 2, 9 and 10):

“2. Although I note your decision to commute the sanction applied from dismissal to a final written warning I believe that your decision was in error and has not properly considered my appeal and amongst other reasons I consider that the decision amounts to discrimination that being less favourable treatment and harassment on the grounds of my race. Taking this into consideration and that the appeal procedure has now been exhausted I feel I have no other option but to raise a grievance to highlight my serious concerns. I have set out the points of my grievance as follows below...”

9. *A further dispute now arises as much to my amazement when I returned to work on 8 July 2019 I was ushered into a meeting concerning further allegations that I had gone off site without permission in May (two months ago) for which I have been suspended. If there was a matter that warranted suspension it makes no sense that it has only been implemented two months after the alleged incident. Further suspension is not a proportionate response to the situation and speaks to a knee jerk and heavy handed reaction and the decision seems to have been taken without any regard to suspension alternatives.*
10. *Moreover this new allegation is the latest instance in a whole series of ill-conceived and muddled investigations that have been proved to have no basis in evidence. I believe that these events – including this latest issue – form part of a sustained campaign towards existing me from the organisation through the pursuit of a scatter-gun approach of petty and misconceived allegations. It is apparent that the strategy is to secure my exit from the organisation through any matters of misconduct that it conceives of. Clearly it was decidedly inconvenient to G1 upon realising that there wasn't sufficient grounds to uphold my dismissal such that it now needs to accomplish the objective by putting forward yet more vindictive and baseless allegations. I consider that this course of conduct amounts to harassment and victimisation within the meaning of sections 26 and 27 respectively of the Equality Act 2010. I fear that it won't be long before I am accused of further nonsensical allegations of misconduct to secure my dismissal."*
32. On 1 August 2019 Ms Princewill, Human Resources, wrote to the Claimant to confirm the outcome of the Claimant's grievance. She said:
- "I have given careful consideration to the issues you raised and I have found that there is insufficient evidence to support your allegation of discrimination and victimisation towards you. It seems to me quite clear that the reason you have been asked to attend a further disciplinary meeting simply because you left site again without permission. Therefore your grievance has not been upheld."...*
33. On 12 August 2019 the Claimant appealed against the outcome of the grievance and the grievance appeal hearing was held on 30 August 2019.
34. On 4 September 2019 the Respondent's account manager confirmed that the grievance appeal was not upheld. The letter included the following:

“Following the appeal hearing on 30 August 2019 at MINI Plant Oxford where you were accompanied by (RH) I can confirm that after carefully considering all the evidence I have decided to uphold the original decision made at the grievance hearing on 22 July 2019...”

In relation to your claims of being bullied victimised and racially discriminated against, I feel that there is no evidence to support these allegations and when questioned in our meeting you were unable to give me any clear examples relating to this investigation or that have not already been dealt with. In addition (LM) (LB) and (T) were discussed as part of your original disciplinary which you appealed and subsequently had the original decision to dismiss overturned and therefore they are not relevant to your latest investigation.”...

35. On 23 October 2019 the Claimant raised queries about his reduced pay.
36. On 15 November 2019 the Claimant was informed by Mr Elmore that, following his suspension on 8 July 2019 the allegation of leaving site without permission on 13 and 14 May 2019 be discussed at a formal disciplinary hearing. A disciplinary hearing was held on 25 November 2019 chaired by Mr Elmore. At the hearing the Claimant was summarily dismissed. A confirmatory letter dated 25 November 2019 was sent to the Claimant including the following:

“Following our disciplinary hearing today to discuss the allegation of leaving site without permission on 13 and 14 May 2019 where you were accompanied by (RH) I would like to formally explain my decision.

An allegation was raised that you left site without permission on 13 May 2019. Whilst investigating this allegation a report was requested from the security team. After reviewing this evidence it was also noted that you had left site during shift on 14 May which has also been confirmed as unauthorised.

I have enclosed a copy of the hearing notes for your records.

Following detailed consideration of the evidence both from my investigation and during the disciplinary hearing, I have decided that there is sufficient evidence showing that you did leave site without permission on 13 and 14 May 2019. This is regarded by G1 Group as gross misconduct and therefore your employment will be terminated

with immediate effect. Your last day of employment with G1 Group is 25 November 2018

As an employee of G1 Group you have a responsibility to behave in an appropriate way whilst in your assignment and in this case you had failed to do so to such a serious level that gross misconduct has clearly been shown. Summary dismissal is therefore an appropriate award for gross misconduct.”

37. On 28 November 2019 the Claimant sent a further letter regarding alleged shortfalls in his pay.

38. On 2 December 2019 the Claimant appealed against his dismissal stating:

“...your decision to dismiss me on the basis of such weak contradictory and unsubstantiated evidence I believe demonstrates that I’ve been subjected to unfair, prejudicial and discriminatory treatment on the basis of my ethnicity during the course of the investigation itself and in relation to the decision to dismiss me from my lawful employ.”...

39. An appeal hearing was held on 14 January 2019 by Ms Davies. She sent a letter to the Claimant dated 20 January 2020 rejecting the appeal which included the following:

“Following on from your appeal hearing on 14 January 2020 to discuss your appeal against the decision to terminate your employment, I am now writing to you to confirm the outcome.

You were dismissed on 25 November 2019 for leaving site on 13 and 14 May 2019 without permission which was deemed as gross misconduct.

I have considered your points discussed in the hearing and the points you raised in your emails to me. ...

In BMW’s Handbook which you must adhere to if your working on their site it states the following:

Walking off-line/site

Walking offline or off site without permission is unacceptable. Should you need to leave your workstation during working hours you should

obtain permission from either your line manager or lead associate. This is not only a matter of courtesy but prevents a health safety risk to yourself and others.

Walking offline without permission could put your assignment at risk with G1 Group. Should you walk off site without obtaining permission from a member of the G1 Group Team or line manager you will be deemed to have terminated your assignment. ...

Referring to leaving site without permission you informed me that "Everyone does it", however, when I asked you to give me additional names of the person you have previously given us to investigate for leaving site, you said that you did not have any more names that was it. I can confirm that the employee in question has been investigated and the circumstances of the offence were not the same...

In conclusion in the G1 Handbook it states that one of our aims for conducting disciplinary meetings is to correct behaviour where possible. In May 2019 you were under investigation for a previous time when you left site without permission. So previous to 13 and 14 May 2019 you had been informed that leaving site and/or your line without permission was classed as gross misconduct. However you went ahead again and left site without requesting any permission.

Taking all of the above into careful consideration I can confirm that I have made the decision to uphold the original decision and sanction of dismissal made at the disciplinary hearing on 25 November 2019. ..."

40. Those are the background facts.

Claims under the Equality Act 2010

41. The claims were set out in detail in **paragraph (7)** of the case management order made on 13 April 2021.
42. At **paragraph (7)(iv)** the Claimant relied on the following as protected acts in support of the claim for victimisation:
- a. **His grievance about the conduct of SW (paras 1 & 2)**. Date 13 October 2017.

- b. **His trade union representative's statement on his behalf that he feels like he is being racially discriminated against (para 3).** Date 14 January 2020.
 - c. **His grievance submitted on 10 July 2019 (para 7).** Date 10 July 2019.
43. The Tribunal found that each one of these matters amounted to protected acts within the meaning of s.27 Equality Act 2010.
44. The Claimant made claims of victimisation, direct race discrimination and race related harassment.

Equality Act 2010

Comparison by reference to circumstances - section 23 Equality Act 2010

45. *Section 23 - On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*

Harassment – section 26(1) Equality Act 2010

46. *Section 26 – Harassment*

(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.

Victimisation – section 27 Equality Act 2010

47. *Section 27 – Victimisation*

(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 –*

a. *bringing proceedings under this Act;*

b. *giving evidence or information about proceedings under this Act;*

c. *doing any other thing for the purposes of or in connection with this Act;*

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

Direct Discrimination – section 13 Equality Act 2010

48. *Section 13*

(1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

Burden of Proof – section 136 Equality Act 2010

49. *Section 136 – Burden of Proof*

(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.*

(3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

Case Law

50. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts 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. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.
51. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.
52. The Tribunal took account of the relevant provisions of the Equality and Human Rights Commission Code of Practice on Employment 2011
53. The claims made by the Claimant were set out in **paragraph 7** of the case management order as follows.

Paragraph 7(i) As claims of victimisation, direct race discrimination and race harassment:

Paragraph 7(i)(a) 17 October 2017 – an assault by his manager (paragraphs 1 & 2 of the particulars of claim).

54. The Tribunal found there was evidence of some degree of physical contact between the Claimant and the manager (a BMW employee) and that the Claimant had alleged that the contact was because of his grievance against his colleague SW against whom he had alleged racial discrimination.
55. However, the Tribunal can find no evidence of any racial motive, race related harassment or detriment because of the protected act in making a

complaint about the conduct of SW in respect of the altercation between the Claimant and the manager. The Claimant had made no claim to the Tribunal against the manager PH or against BMW. The Tribunal would have had no jurisdiction to consider claims against any of these entities under the Equality Act 2010.

56. This claim was therefore not proved.

Paragraph (7)(i)(b) 8 May 2019 being accused by the named individuals of shouting etc (para 4 of the particulars of complaint)

57. This alleged incident took place at the meeting held on 22 August 2018.
58. The Claimant referred to this event at paragraph 4 of the particulars of claim as follows:

“8 May 2019 got accused by BMW Managers Toni Crutchley, Carl Dodds and G1 Staff Collena Nicola and Union member Leigh Willis of shouting being abusive threatening intimidating swearing and being in their face which did not happen and as I can prove as I recorded the meeting. Why would I lie? I feel like it’s because I’m black there is no other reason”.

59. At the meeting on 8 May 2019 the Claimant referred back to the meeting on 22 August 2018 and said, *“Last time the union rep (LW) – Collena Leigh and Nicola. Leigh was slagging me off they were always on my back trying to get me into trouble.”.. “I don’t know why they called security I was not aggressive. Leigh said I am a ticking time-bomb. I have been punched in the chest by a manager . Nothing happened. G1 are too close with the managers.”*
60. The Tribunal found that the persons named in paragraph 4 of the Claimant’s particulars of claim were not present at the meeting on 8 May 2019.
61. It was clear from the record of interview on page 175 that the persons present at the 22 August 2018 meeting were the Claimant, Collena and Mr Willis. The two BMW managers referred to were not present at the meeting. It is clear from pages 175 and 176 of the bundle of documents that security officers were called to the meeting on 22 August 2018. The security officers record states:

“On Wednesday 22 August 2018 at approximately 19.40 hours the Duty PA5S Controller received a phone call from a G1 Manager requesting PA5S assistance because she had concerns about male’s potential confrontational attitude due to how he was conducting himself.”

62. The record of the meeting stated in the last paragraph:
63. *“Ryan refused to give his statement. He got very aggressive before Collena rang security (report from security should be sent to Ryan’s manager). Was sent back to work by his PL.”*
64. The Tribunal found that the Claimant was accused of shouting and being aggressive but there was no evidence that the accusation was the result of a racial motive, race related harassment or because of the Claimant’s previous protected acts.
65. This claim was therefore not proved.

Paragraph (7)(i)(c) 15 May 2019 – being dismissed, including as separate points of victimisation, race harassment and direct race discrimination it taking until May 2019 to reach a conclusion on matters occurring in May to August 2018 and not being updated on the progress of the investigation (paras 5 & 13 of the particulars of claim).

66. The Tribunal found that it was factually proved that the Claimant was dismissed on 15 May 2019 and the reason for dismissal was his alleged unauthorised absence on 12 June 2018. That was a plausible non-discriminatory reason as set out in the letter of dismissal from Mr Elmore. The delay in the disciplinary process was caused by a number of factors. The Claimant was absent through illness, not available to take part in the process, and he had submitted various grievances. The Respondent decided, properly, to put the disciplinary process on hold pending the outcome of the grievances. He was absent from 27 July 2018 to 20 August 2018. The grievance was considered from 13 September 2018 to 25 November 2019 and the Claimant was absent on sick leave from September 2018 to February 2019. There was significant delay from February 2019 but there was no evidence of any racial motivation or race related conduct or any evidence that the Claimant’s protected acts had influenced any delay.
67. There was no evidence of any failure to provide updates.

68. This claim was therefore not proved.

Paragraph (7)(i)(d) 8 July 2019 - being suspended

69. The Tribunal found as a fact that the Claimant was suspended on 8 July 2019 and the suspension letter giving the reason for suspension is set out above.

70. The Tribunal found that there were plausible non-discriminatory reasons for the Claimant's suspension, namely his alleged unauthorised absence on 13 and 14 May 2019 and no evidence whatsoever of any racial motivation for this act or that any protected acts preceding this event influenced the suspension.

71. This claim was therefore not proved.

Paragraph (7)(i)(e) 4 September 2019 – the rejection of his grievance appeal 10 July 2019.

72. The reasons for the grievance appeal decision were given by Ms Lowe.

73. There was a written explanation of the reason for the rejection of the appeal and there was no evidence of any racial motive. It was not race related and there was no evidence that it was motivated in any way by the Claimant's protected acts.

74. This claim was therefore not proved.

Paragraph (7)(i)(f) - 20 January 2020 The rejection of his appeal against his dismissal.

75. Ms Davies gave full reasons for the rejection of the Claimant's appeal against dismissal which the Tribunal found to be plausible, supported by evidence and non-discriminatory. There was no evidence of any racial motive involved. There was no race related harassment and there was no evidence that any of the protected acts influenced the decision.

76. This claim was therefore not proved.

Paragraph (7)(ii) As a claim of unfair dismissal, victimisation and direct race discrimination his dismissal on 25 November 2019.

77. The reasons for the Claimant's dismissal on 25 November 2019 was set out in the letter of that date is quoted above. The Tribunal found that the reasons were plausible, supported by documentary evidence and there was no evidence of any racial motive or any race related harassment or that the dismissal was motivated by any of the Claimant's protected acts.
78. As an act of race discrimination race harassment or victimisation the dismissal on 25 November 2019 was found not proved.

Paragraph (7)(iii) as a claim of victimisation and unlawful deduction from wages deductions being made from his pay during his period of suspension.

79. The Tribunal found that there was no evidence of the Claimant's pay being reduced or withheld because he had made protected acts. There was no evidence whatsoever to support this allegation.
80. The Tribunal found this claim of victimisation was not proved.

Racial motivation/protected act detriment.

81. During the course of his evidence under oath when questioned by the Tribunal, the Claimant said that he was victimised and bullied because of his race and that BMW and G1 Group worked together. In other words it was a conspiracy. The Tribunal found no evidence whatsoever to support this allegation.
82. When asked where the Tribunal might find a causal link between the treatment alleged by the Claimant and his race he said it was because he thought it was so and that his trade union representative also thought that. In the Claimant's particulars of claim at paragraph 13 he said:
- "Why would I get sacked for the same thing? If it's not because of my race what is it? Why would they lie about me to get the sack? I feel like it's got to do with that I'm black, if not why is it?"*
83. In answer to questions during the Tribunal hearing the Claimant was asked whether he had experienced any animosity towards his colour or race. He said only by his trade union representative, Mr Willis, but nothing from anyone else.
84. All the allegations of racially motivated treatment and detriments because of protected acts were based upon the Claimant's feelings and perceptions. He said that it must be because of his race or colour

because he could not think of any other reason. However, the Tribunal found that the Respondent's witnesses were able to provide plausible non-discriminatory reasons for each one of the matters referred to above in **paragraph 7** of the case management order and at no point did the burden of proof shift to the Respondent.

85. This was a case where the Claimant's allegations of racial motive and protected act victimisation were unsupported by any reliable evidence, or indeed by any evidence whatsoever.
86. Insofar as time limits were concerned, any claim under the Equality Act 2010 for an act before 25 November 2019 would be out of time. The Respondent said that the Claimant did not give any explanation as to why any out of time claims should be considered by the Tribunal.
87. The Claimant said in his closing submissions that the discrimination claims part of a continuing act culminating in his dismissal and that if the Tribunal did not agree it should extend time under the just and equitable principal because he had submitted grievances for the alleged discriminatory acts and the Respondent was aware of the detail of the complaints at the time.
88. The Tribunal made substantive decisions on each of the individual claims Equality Act 2010 above. The Claimant's submissions had merit, and the Tribunal considered that it was just and equitable to extend time for any claims which were out of time. The Tribunal did not consider it necessary to make a separate decision on time limits on each individual claim.
89. The unfair dismissal claim was not out of time.

Unfair Dismissal – section 98 Employment Rights Act 1996

90. *Section 98. General*
 - (1) *In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
 - (a) *the reason (or if more than one the principal reason) for the dismissal, and*
 - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the*

dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

... (b) relates to the conduct of the employee, ...

(3) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

91. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer.
92. For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.
93. Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.
94. Secondly whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of

the case. Did the investigation and the dismissal fall within the range of reasonable responses.

95. Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses test. That test applies to all stages in the procedure followed by the employer, including the investigation, the dismissal and the appeal.
96. In Santamera v Express Cargo Forwarding [2003] IRLR 273 the EAT said that fairness does not require a forensic or quasi-judicial investigation for which the employer is unlikely in any event to be qualified and for which it may lack the means. In each case the question is whether or not the employer fulfils the test laid down in British Home Stores v Burchell and it will be for the Tribunal to decide whether the employer acted reasonably and whether or not the process was fair.
97. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.
98. The Claimant was dismissed summarily on 25 November 2019 by Mr Elmore for gross misconduct in leaving the work site without permission on 13 and 14 May 2019.
99. The contents of the dismissal letter dated 25 November 2019, giving the reasons for dismissal are quoted above.
100. The Tribunal found unfairness on four counts.
101. Firstly, there was a failure to conduct a reasonable investigation into the assertion by the Claimant and his trade union representative that there was a general practice of employees at the site to leave through the security turnstiles, without any specific approval, agreement or notification to their supervisors, during break times. Specifically, he said that he only went out on 13 and 14 May 2019 to visit his car in the adjacent car park for sandwiches which he either ate on return to his place of work or in the car during his break time.

102. At the appeal hearing on 14 January 2020 the record of interview included the following:

“HD – You left site on 13 May 2019 and there seems to be no record of you obtaining permission to do so? Did you obtain permission from any senior member of staff?”

RP (Claimant) - I don't need permission. I went to my car to get breakfast out of my car. The car park is still on site.

HD - I would class leaving site as leaving the factory.

RP- Everyone does it. I've never been told that I can't go here or can't go there. I took a video this morning because it happens all the time....

103. Later the Claimant's union representative said:

“Day after day Ryan on 13 and 14 May went to his car to get food that is done by dozens of people every single day. As long as back at work at the end of tea break. Basically victimisation on Ryan.”

104. This point had been raised at the Claimant's disciplinary hearing on 25 November 2019 at which the Claimant's union representative said:

“You can go to any of the gates at any tea break and people go out. Go to assembly and there are dozens upon dozens at the tea break go out through the gate to the café across the road. Agency or BMW it doesn't matter. ... No one at any time gets reported or criticised as long as they return back from tea break... Standard. Common practice”.

105. The Respondent asked for comparators and the Claimant named three comparators whose circumstances were looked at and discounted. The Respondent failed to investigate the assertions by the Claimant and his trade union representatives that this was a widespread practice done during break times by dozens of other employees. There was no evidence of any procedure in place by the Respondent for obtaining permission to exit the site or to notify a supervisor of exiting the site or the recording of any such permission or notification.

106. The Tribunal found that the Respondent unreasonably failed at the dismissal stage and at the appeal stage to investigate the assertions by

the Claimant and his trade union representative, made clearly and recorded both in the Respondent's notes of the meetings on 25 November 2019 and 14 January 2020 that the practice was widespread and unregulated and therefore, in the view of the Claimant and his trade union representatives, condoned and accepted.

107. Both Mr Elmore (dismissing officer) and Ms Davies (appeal officer) confirmed that they did not investigate the assertions that this was a widespread and common practice. During the course of the Tribunal hearing Ms Davies confirmed she did not look into the assertion that this was a practice which happened all the time. She was asked whether it would make any difference if she had found dozens of others doing it without permission and she said "*possibly*".
108. The failure on the part of the Respondent, at both the disciplinary hearing and the appeal hearing to conduct a reasonable investigation into assertions made by the Claimant and on his behalf was such a serious failure to investigate as to make the dismissal unfair. Having failed to investigate this matter the Respondent could not have had a reasonable belief in the alleged misconduct of the Claimant.
109. Secondly, the Claimant was dismissed (see letter dated 25 November 2019 quoted above) for "*leaving site without permission on 13 and 14 May 2019.*"
110. There was genuine confusion between the Claimant and the Respondent as to what was meant by "leaving site" and what "site" actually was.
111. On page 73 the Respondent's policy was set out as follows:

"2.24 Leaving your place of work.

Where it is necessary for an associate to leave the section where he/she normally works or enter another section (unless it is part of his/her job requirement) he/she is required to seek the permission of his/her supervisor to leave the section and obtain the approval of the supervisor of any section which he/she requires to enter. Health and safety aspects as prime consideration in the requirement.

...

7.11 Following are examples of misconduct for which an associate may be summarily dismissed:

...

- *Leaving the plant without permission.*

112. In the appeal outcome email dated 20 January 2020 Mr Davies quoted the BMW Handbook paragraph headed "Walking offline/site" quoted above.
113. It follows that there were several conflicting policies regarding the Claimant's alleged misconduct including "leaving site", "Leaving place of work", "leaving section", "Leaving plant", "Walking offline/site".
114. The factory was bounded by security fences with electronic turnstiles accessed by a swipe card. Beyond the turnstiles was the company car park reserved for staff of BMW and G1 and authorised visitors.
115. The Claimant considered and maintained throughout the disciplinary proceedings and the Tribunal hearing that the car park was part of the "site" and that exiting through the turnstiles was not "leaving site" and that if he went to his car to collect items it was not leaving site and no permission was required. He also asserted that on 13 and 14 May 2019 he went to the car park during his breaks and when he was not required to be working.
116. The Tribunal found that there was genuine confusion in the mind of the Claimant regarding conflicting policies regarding what was on site and what was leaving the site. This was made clear in the course of the disciplinary interview and the appeal interview.
117. The Tribunal found that this issue was not sufficiently or reasonably investigated by the Respondent such as to provide genuine grounds for a reasonable belief in the Claimant's misconduct.
118. Thirdly, Mr Elmore conducted the disciplinary interview on 25 November 2019 and summarily dismissed the Claimant. In his witness statement he had stated as follows:

"2. I conducted the disciplinary hearing with Ryan Parkinson. I was asked to do the disciplinary because I believe I was the next person in the chain of authority who was yet to deal with Ryan's grievances or

disciplinaries. When I was asked to do the disciplinary I had not heard of Ryan Parkinson nor had anything to do with him. I had not been involved at any stage.”

119. However, when Mr Elmore was asked to attest the truth of his witness statement at the start of his evidence before the Tribunal, he accepted that he was present throughout the whole appeal hearing on 17 June 2019 regarding the earlier matter as the note taker. He said that paragraph 2 was in error. When he was asked by the Tribunal why did he put paragraph 2 in his witness statement he said, “I can’t recall why I wrote that”. The Tribunal found that paragraph 2 was clearly untrue.
120. Whether paragraph 2 was simply an error or not, it was in the Tribunal's view unfair for Mr Elmore to conduct the disciplinary hearing on 25 November 2019 when he had previously been involved in the Claimant's disciplinary appeal on an earlier similar matter for which the Claimant had been dismissed on 15 May 2019 but reinstated on appeal. Mr Elmore's impartiality was seriously compromised. Although paragraph 2 was withdrawn before he attested on oath to the truth of that paragraph, it is clear that his previous involvement in the earlier matter was not disclosed by him to the Claimant at the start of the disciplinary hearing on 25 November 2019. It is also of note that the earlier matter for which the Claimant had been dismissed and reinstated was not mentioned by Mr Elmore in his dismissal letter of 25 November 2019.
121. No mention was made of Mr Elmore's previous involvement in the earlier matter during the appeal hearing or the appeal outcome by Ms Davies on 20 January 2020.
122. The Tribunal found that Mr Elmore's involvement in the earlier matter and as the dismissing officer in the second matter made the dismissal on 25 November 2019 procedurally unfair. There would have been many other managers who had no involvement in the earlier matter who could have dealt with the alleged misconduct for which the Claimant was finally dismissed.
123. Fourthly, the Tribunal found that the dismissal on 25 November 2019 was also substantively unfair. Leaving a secure area through a turnstile for a few minutes to visit a car in the company car park when, it seems, that many other employees did exactly the same, though not investigated by the Respondent, did not amount to gross misconduct. He left his place of work to visit his car to collect his sandwiches during a break. The earlier conduct on 17 June 2018 was clearly more serious, when he went off to

visit a Burger King outlet, but the dismissal on 15 May 2019 was seen by Mr Grieg as “quite harsh” and overturned on appeal. The Tribunal found that briefly visiting the company car park for sandwiches on 13 and 14 May 2019 was a much lesser matter, particularly in view of the unreasonable shortcomings of the Respondent’s investigations highlighted above. The decision to dismiss in these circumstances was outside the range of reasonable responses.

124. Accordingly, the Tribunal found that the dismissal on 25 November 2019 was both procedurally and substantively unfair.

Unauthorised deduction from wages.

125. This claim is set out, albeit without reasoning, in the Claimant’s Schedule of Loss at pages 27-29 of the bundle.
126. The Tribunal found that it had insufficient evidence regarding the circumstances described regarding shortfalls in pay between September 2019 to November 2019 and required more information than was set out by the Respondent in the correspondence pages 261 (7 November 2019) and page 272 (28 November 2019). Further evidence regarding these matters will be required at the remedy hearing ordered above.

Remedy hearing.

127. A remedy hearing will be required to establish the amount of compensation which should be awarded to the Claimant for unfair dismissal and to consider the claim for unauthorised deduction from wages.
128. No later than 14 days before the remedy hearing the parties are ordered to provide written submissions to each other and to the Tribunal regarding remedy matters. Submissions should include submissions regarding any alleged contributory conduct on the part of the Claimant and any assertions regarding reduction in compensation under the Polkey principle.

I confirm that this is the Judgment and Reasons in the case of Mr R Parkinson v GI Group Recruitment Ltd case no. 3302702/2020 and that I have dated and signed by electronic signature.

Case Number: 3302702/2020

Employment Judge Vowles

Date: *21 March 2022*

Sent to the parties on:

25 March 2022

For the Tribunals Office