



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Badu  
**Respondent:** Brooknight Security Limited  
**Heard at:** East London Hearing Centre  
**On:** 4<sup>th</sup> and 5<sup>th</sup> November 2021  
**Before:** Employment Judge Reid  
**Members:** Mr J Quinlan  
Mr J Webb

## Representation

**Claimant:** in person  
**Respondent:** Ms J Barnett, Holly Blue Employment Law

*This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.*

## JUDGMENT (Reserved)

The judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996.
2. The Respondent did not unlawfully discriminate against the Claimant contrary to s13 Equality Act 2010 (direct discrimination) when it dismissed the Claimant. His claim for race discrimination is dismissed.
3. The Claimant was entitled to 6.99 days accrued holiday pay when his employment terminated. It is not clear that the payment made to him on 10<sup>th</sup> July 2020 in fact represented 6.99 days pay for the Claimant based on his 48 hour working week. See Orders attached.

**Note:** a remedy (compensation) hearing has been booked with the parties for **28<sup>th</sup> January 2022** (one day – CVP video). The Tribunal's findings in this judgment may however assist the parties to settle the claims, if they wish to do so, in which case the next hearing would not be necessary. Orders relevant to that hearing are attached.

**Mr Badu** – please read in particular paras 66-72 at the end of this document.

# REASONS

## Background and claims

1. The Claimant was employed by the Respondent as a Security Officer. His employment with his previous employer Vision Security Group Limited (VSG) commenced on 1st July 2010 according to the Respondent (but on both 10<sup>th</sup> June 2010 or 12<sup>th</sup> July 2012 according to the Claimant's claim form) and he transferred to the Respondent under TUPE on 8th August 2019 when the Respondent took over the security contract for the Eddie Stobart site where the Claimant worked. The Claimant was dismissed with immediate effect on 29th June 2020 for gross misconduct. There are stray references in the documents to Mitie who took over VSG after the transfer but who are not relevant to this claim.
2. The Claimant brought claims for unfair dismissal, for direct race discrimination and for accrued holiday pay in a claim form presented on 24<sup>th</sup> September 2020, having completed ACAS conciliation between 22<sup>nd</sup> July 2020 and 23<sup>rd</sup> July 2020. A preliminary hearing was held on 24<sup>th</sup> September 2021 which identified the three claims and that the claimed act of direct race discrimination was his dismissal. The Respondent defended the claims and said that the Claimant was dismissed because he had falsely booked in to his 6am shift but had in fact arrived at 6.28am, had failed to tell anyone he had been late and had claimed, until the matter was discovered, that he had been working since 6am. The Respondent denied discrimination. It said it had paid him all his accrued untaken holiday on 10<sup>th</sup> July 2020. The Claimant did not bring a claim for his notice pay.

## Unfair dismissal claim

3. The way the Claimant put his unfair dismissal claim was clarified with him at the beginning of the hearing because he said in his claim form that he thought he had been treated the way he had firstly because the Respondent wanted to get rid of employees who were not on zero hours contracts and also secondly because of his race. At the beginning of the hearing the Claimant confirmed that he was not claiming that his treatment was motivated by a wish on the part of the Respondent to get rid of employees who were not on zero hours contracts ie he was not saying that was the real reason for his dismissal. He confirmed that he was however claiming that the real reason for his dismissal was his race. However in submissions the Claimant reverted to saying that at least part of the reason for his dismissal was the wish to get rid of employees who were not on zero hours contracts. He was therefore claiming the real reason for his dismissal was not his conduct on 4<sup>th</sup> June 2020 but another reason(s).

4. In terms of claimed unfairness the Claimant in his claim form identified (a) he had never had any previous warnings at VSG (b) the previous final written warning for sleeping on duty had been unfair and (c) the lack of an appeal against his dismissal. In submissions he also said his dismissal was unfair because when the Respondent took over the contract at the site, he had been very flexible and helpful and had helped the Respondent's managers with the transition, staying late if necessary or not taking breaks; he considered that flexibility should go both ways.
5. The Claimant accepted in his claim form that he had booked in for work (ET1 8.2 para 5). He said he was at the site entrance when he did that. His case was therefore that he had in fact arrived for work around 6am, but then had to leave to look for his wallet which he thought he had dropped on the way in to work. The Respondent's case was that he had not in fact arrived when he confirmed on the phone that he was booking in for his shift and that he did not arrive for work at all until 6.28am.
6. The Respondent's case was that he had been fairly dismissed for falsifying his hours (taking into account the previous recent final written warning for sleeping on duty) and that he would have been dismissed in any event even if there had been flaws in the procedure followed by the Respondent. The Respondent also argued contributory fault. It was clarified with the Respondent at the beginning of the hearing that the Respondent's case was that the Claimant had not told the truth when he gave his explanation for being absent, namely that he had arrived but then had been retracing his steps looking for his lost wallet.

#### Race discrimination claim

7. In relation to the Claimant's claim for direct race discrimination, his claim was also clarified at the beginning of the hearing. At the preliminary hearing it was identified that the only act complained of was his dismissal. He put his claim as either he was dismissed because he is black or that a white employee doing what he was accused of would not have been dismissed. He said at the beginning of the hearing he could not identify an actual comparator and when it was explained to him how the Equality Act works in relation to showing a comparator he said he relied on a hypothetical comparator. In the middle of his evidence he recalled the name of somebody he thought was a comparator, a colleague called Ron March who was late for work and was not disciplined in around March-April 2020. Mr March is white. During Mr O'Brien's evidence it emerged that the colleague the Claimant was probably referring to was Ron Broughton a white employee who had a record of being late for work and informal action was taken against him in the form of a discussion with his manager and a period to improve. The Respondent's case was that Mr Broughton was not an appropriate comparator because his situation was not similar to the Claimant's in that Mr Broughton's issue was being late for work whereas the Claimant's was not being at work for around 28 minutes when he had said he was already at work.

#### Holiday pay claim

8. The Claimant confirmed at the beginning of the hearing that he claimed accrued but untaken holiday pay for the period between April and June 2020 ie three months in the 2020-2021 holiday year running up to the termination of his employment. He said

he was not sure how many days that amounted to. In his oral evidence he said his case was that even though he had only worked for three months in that holiday year, he was entitled to be paid on termination for the entire holiday entitlement for the complete year ie 28 days. He said this was a term of his employment which had transferred with him from VSG. The Respondent's case was that it had paid all his accrued but untaken holiday for the period between April and June 2020, in July 2020. At the end of the hearing the following parameters were established with the parties. It was agreed that the Claimant had completed three complete months between April and June 2020 and that the Respondent's holiday year ran from 1<sup>st</sup> April to 31<sup>st</sup> March (the same as it had been at VSG). This meant that, in the absence of any agreement to the contrary, holiday accrued at 2.33 days per month (based on 28 days entitlement) and the Claimant had accrued 6.99 days accrued untaken holiday by the time his employment was terminated. The Respondent identified that 45.47 hours of accrued untaken holiday pay were paid on 10<sup>th</sup> July 2020. This equated to treating a day's holiday pay as 6.5 hours. This seemed at odds with both the VSG method of calculating a day's pay for the purposes of holiday pay and also at odds with the Respondent's method in its handbook. Mr O'Brien was unable to explain how the 45.47 hours was calculated and the issue was left with him to investigate further.

9. The hearing was listed for two days and the Tribunal heard oral evidence from the Claimant and from Mr O'Brien. The legal issues and tests were explained to the Claimant because he was not represented and the Tribunal allowed extra time for the Claimant to put together his thoughts for his submissions overnight before the second day, when submissions were heard. The Respondent additionally provided written submissions which the Tribunal asked the Respondent's representative to also read out as that would be easier for the Claimant to follow. The Tribunal reserved its judgment.
10. The Tribunal was provided with an electronic bundle of 106 pages (plus separately a copy of the Claimant's previous final written warning dated 13<sup>th</sup> May 2020) and a witness statement from Mr O'Brien (Head of Operations). Mr O'Brien did not take the decision to dismiss which was taken by Mr Fieldhouse who has since left the Respondent. Mr O'Brien's involvement had been with the administration of the dismissal and although he had not taken the decision to dismiss, he had discussed the decision with Mr Fieldhouse before Mr Fieldhouse made the decision and it was Mr O'Brien who sent the Claimant's dismissal letter.
11. The Claimant's response to the Order to provide a schedule of loss and a witness statement was to provide two very short emails dated 28<sup>th</sup> October 2021 which he did not copy to the Respondent and these were provided to the Respondent on the morning of the first day. Because the Claimant had not provided a full witness statement the Tribunal commenced his evidence by asking him to give his account of what happened on 4<sup>th</sup> of June 2020 and thereafter in his own words before he was cross-examined on behalf of the Respondent.
12. The Tribunal did not hear the audio and video recordings relating to the incident on 4<sup>th</sup> June 2020. It was not necessary to do so because the Claimant accepted that in the audio recording (of the phone call between him and the Respondent's Control Centre in Milton Keynes around 6.05 am) he said that he was at work already. He also accepted that the subsequent video recording at 6.28 am showed him arriving

on site and that that is when he went to the security office/cabin on site to start work. He accepted that he had been absent during this period, he said looking for a lost wallet. He said that when he booked in during the phone call he had been at the gate, about to go in.

### **Tribunal findings of fact**

#### **The disciplinary procedure**

13. At the time of his dismissal the Claimant had a pre-existing final written warning about sleeping on duty issued on 13<sup>th</sup> May 2020 which was to remain live for 12 months. The letter recorded that he had not been dismissed at that time because his length of service had been taken into account but that if there was any further misconduct it could result in dismissal. The Claimant disputed the fairness of this warning at the hearing saying he had been inappropriately filmed by a colleague when asleep during his break. The Tribunal however finds that whilst the Claimant disputed that he had been asleep during actual working time he did not appeal the final written warning, it had been issued in good faith and there was on the face of it grounds to issue it.
14. The Claimant was invited to a disciplinary hearing by letter dated 11th June 2020 (page 66). It was clear from the letter that the allegation was about what happened on the 4th of June 2020. The Claimant was provided with a copy of the audio and video recordings. The Tribunal finds based on Mr O'Brien's oral evidence that when the Claimant joined the Respondent, he received a copy of its disciplinary policy as part of its starter pack (page 48-64 ). That policy provides that falsely clocking on or off duty is an example of gross misconduct (page 51, para 3.9.1). The Tribunal finds that the way a security officer clocked on at the client site was to phone the Respondent's central Control Room in Milton Keynes on arrival to say that they had arrived. If the employee did not call within five minutes of their expected start time an alert would be triggered in the Control Room and the Control Room would call them instead.
15. The Claimant was accompanied at the disciplinary hearing on 23<sup>rd</sup> June 2020 by his colleague and friend Mr Barby Mohammad who had also transferred over from VSG with the Claimant. The Tribunal finds that the disciplinary hearing conducted by Mr Fieldhouse (minutes pages 73-79) was slightly chaotic at times because the Claimant's explanations and comments were confusing and he appeared to raise irrelevant points. Mr Mohammad was also sometimes interrupting and speaking for the Claimant, rather than just acting as his companion. However, in amongst a degree of confusion Mr Mohammad said (page 78) that before he later found out what had happened that morning, he had seen the Claimant walking up and down the perimeter fence (though he expressed it in slightly less clear terms than that). He was saying he understood later when he spoke to the Claimant what he had been doing, namely looking for his wallet. This apparently contemporaneous sighting of the Claimant was potentially relevant, if Mr Mohammed's evidence tended to show that the Claimant's explanation for being absent was in fact true and that he had not been dishonest when he said in the call that he was already at work (albeit only at the site entrance and not yet on site). The Respondent did not pick up on Mr Mohammad's comment and went on to decide that it rejected the Claimant's explanation entirely namely firstly that he had been at the site at 6.05 am and secondly that he had then been looking for his wallet.

The Tribunal finds that a reasonable employer in these circumstances would have followed up with Mr Mohammad to investigate how he said he saw the Claimant from where he was at the time, walking near the fence, and separately interviewed Mr Muhammad about this, albeit that might have been a very brief interview to get his account. That statement could then have been shared with the Claimant and the disciplinary hearing reconvened. The Tribunal finds that the Respondent therefore unreasonably failed to interview a relevant witness in line with its own procedure (page 58 para 4.25).

16. Mr Fieldhouse took the decision to dismiss the Claimant with immediate effect for gross misconduct. The Claimant was sent the letter (page 80) by Mr O'Brien to confirm that dismissal. The Tribunal finds that the dismissal letter did not clearly set out that the Respondent did not believe the Claimant's explanation, namely looking for his missing wallet or say that in any event his explanation did not alter the conclusion that he had not been at work at 6.05 am when he took the call (which was dishonest) and had then been absent until 6.28am. The Tribunal finds that the letter danced around the issue and said instead that the reason he had given for his absence ie his explanation was 'not acceptable', which suggested that the Respondent accepted the truth of his account but it wasn't a good enough reason. That is not the same thing as saying the Respondent did not believe his account at all. In addition, the letter referred to there being no 'sufficiently mitigating circumstances' but the Respondent had not accepted there were any mitigating circumstances at all, not that what the Claimant had put forward was insufficient, because the Respondent had not in fact believed the Claimant's account at all. The letter did not specifically refer to the Respondent's conclusion that what the Claimant had done was a falsification of records (ie booking in for work when he was not at work) or refer to para 3.9.1 which was the obvious part of the disciplinary policy to refer to, if relying on it. The letter went on to state that the unacceptable conduct was the booking on but arriving on site late and there is a reference to a breach of trust and confidence but the letter did not clearly tell the Claimant that his account had not been believed. The knock on effect of this was that the Claimant did not have a clear explanation against which to react when considering his appeal and did not have the opportunity of providing evidence to show he had in fact arrived at the site and had been looking for his wallet and had not made it up as an explanation for his absence. The Tribunal finds that the dismissal letter therefore breached the ACAS code of practice paragraph 22 because it did not clearly tell him that the reason he was dismissed was because his explanation was not accepted as true and that it was consequently not accepted that (a) he had as he claimed arrived at work by 6.05am when he took the call from the Control Room and (b) then been absent because of looking for his wallet. The Claimant knew why he had been dismissed namely for the incident on the 4th of June 2020 as this had been clear in the initial invitation letter to the meeting and in the dismissal letter, but at the end of the disciplinary process that had not been followed through with a clear explanation that the Respondent simply did not believe his account. This in turn had a knock on effect on his appeal (see below) because when told he had to produce fresh evidence he did not know to consider whether there might be evidence that he had in fact arrived at the site by 6.05 am (eg his bus journey on his Oyster card) or to ask Mr Mohammad to do a statement about what he said he had seen the Claimant doing.

17. The Claimant sent an email saying he wanted to appeal the decision (page 81). He did not set out his grounds of appeal, which the Respondent was entitled to ask him for under its own policy (page 63, para 4.38). The Respondent replied (page 82) saying that he could only appeal the dismissal if he had fresh evidence or something that was not considered at the time. The Respondent's own policy (page 63-64) contained no such constraint on the right of appeal. The policy at paragraph 4.42 sets out that an appeal can be a complete rehearing or a review which makes it clear that an employee does not need to have fresh evidence/raise a new issue in order to appeal. Mr O'Brien in his oral evidence referred to paragraph 4.41 but that relates to a different issue ie the need to investigate new matters which arise during the appeal as opposed to having fresh evidence in order to make an appeal in the first place. The Respondent's restriction of the appeal in this way was therefore in breach of its own policy. The Respondent was entitled to ask the Claimant for his grounds for appeal but that is not what the Respondent was asking the Claimant to provide but was instead telling the Claimant that his appeal rights were more restricted than its own policy stated. The Claimant was not able to give grounds for appeal about fresh evidence as he considered he did not have any fresh evidence. The Respondent's restriction of the Claimant's appeal rights in this way also breached the ACAS Code of Practice paragraph 26 which only requires that an employee tell their employer the grounds they are appealing on and does not otherwise restrict the right of appeal meaning it can be on any grounds and whether or not there is new evidence. The Claimant never provided those grounds because he had been told he needed fresh evidence. No appeal therefore took place.
18. Taking the above findings of fact into account firstly the Tribunal concludes that the Respondent did not undertake a reasonable investigation because it unreasonably did not follow up with Mr Mohammad who was a potential witness to the Claimant's account of having arrived for work by 6.05am and to why he said he had then been absent from work. Secondly, the dismissal letter did not clearly tell the Claimant that the reason he was dismissed was because his account had not been believed in breach of the ACAS Code of Practice. Thirdly, the Respondent cut down the Claimant's appeal rights in breach of its own policy and in breach of the ACAS Code of Practice.
19. Taking into account the events of 4<sup>th</sup> June 2020 and the previous final written warning, the Tribunal finds that the sole reason for his dismissal was his conduct on 4<sup>th</sup> June 2020 and not any desire on the part of the Respondent to get rid of employees not on zero hours contracts. It in any event accepted Mr O'Brien's oral evidence that the Respondent does not have zero hours contracts. The real and only reason for dismissal was the Claimant's conduct.

Would the Claimant have been dismissed in any event even with a fair procedure?

20. The Tribunal however finds that notwithstanding the above procedural defects in the dismissal procedure, the Claimant would have been dismissed in any event even if a fair procedure had been followed. This is because even if the Respondent had accepted that the Claimant had in fact been absent for the reason he gave, namely looking for his wallet, it could still have fairly dismissed the Claimant because whatever his explanation for the subsequent absence was, he had told the Respondent that he had arrived at work at 6.05 (and was therefore on site and working) when he had in fact started work at 6:28 am and the Claimant accepted that

he had booked in but had then not started work. He had also not told his manager or supervisor that he had a problem and needed to look for his wallet or told his manager or supervisor when he arrived at work at 6.28am that he had been absent and why he had been absent; instead he only provided the explanation when asked later. His wallet explanation had it been accepted might reasonably have been a mitigating circumstance but it is likely that the Respondent could reasonably still have discounted that as being sufficient to justify his conduct, taking into account the Claimant's pre-existing final written warning issue only some three weeks before this incident.

21. The Tribunal finds that had a fair procedure been followed the Claimant's employment would have lasted a further three weeks beyond his termination date of 29th June 2020.

#### The Claimant's conduct on 4<sup>th</sup> June 2020

22. The Tribunal finds that this is what in fact happened on 4th of June 2020 as regards the Claimant's conduct. The Tribunal finds that the Claimant was running late that day, based on his oral evidence. The Tribunal finds based on Mr O'Brien's oral evidence that contrary to the Claimant's assertion that it was the Claimant who called the Respondent's Control Room to book in for his 6.00 am start, he was late and it triggered an alert at the Control Room, meaning that it was the Respondent who called him, as was evident from the audio recording, which the Claimant did not dispute. The Claimant at the time and for this hearing did not produce any evidence of his claimed contact with TfL to report his missing wallet (minutes page 74,77) or that he had in fact arrived at the gate when he took the call at 6.05am. The Claimant did not use the intercom at the gate to let his supervisor or Mr Mohammed (or whoever was on shift with him in the security office/cabin on site) to let them know that he needed to retrace his steps. He did not tell anyone when he arrived in work at 6.28am what he said had happened and it was not until later that day when asked that he gave the wallet explanation. In particular according to Mr Mohammad he did not tell Mr Mohammad who was his friend, until Mr Mohammed asked him why he appeared upset. Whilst the Tribunal acknowledges that Mr Mohammad in the disciplinary meeting notes does say he had seen the Claimant apparently looking along the fence at the time, which Mr O'Brien accepted in evidence might have been possible via the CCTV screens from the on-site security office/ cabin, the Tribunal concludes on balance on the evidence before it that what in fact happened was that the Claimant was running late and when he spoke to the Respondent at 6:05 (when called), said he had arrived at work when he had not. This meant that he was paid for approximately half an hour when he was not at work and he created the wallet explanation later that day to try to explain his absence. The Tribunal finds this to be blameworthy conduct as it involves a degree of dishonesty because firstly the Claimant was not at work when he had told the Respondent he was (at 6.05) and secondly created an explanation to in effect cover up the fact he had simply been late for work that day.

#### Race discrimination

23. To the extent that the Claimant was referring as his comparator to Mr Ron Broughton, the Tribunal finds that there was a material difference between the Claimant's circumstances and Mr Broughton because the Respondent's issue



with Mr Broughton was being late for work. This was a different issue to booking in for work and representing you are at work and on site, and then not arriving to start work until around half an hour later, which involves a degree of dishonesty. Mr Broughton is therefore not an appropriate actual comparator.

24. The Claimant in his oral evidence gave some examples of alleged poor treatment of black members of staff who had transferred from VSG. He said that white employees were late for work and no disciplinary action was taken and said that he had been disciplined previously for sleeping at work when a white employee was not. He also said that a white colleague had not been disciplined for not filing driver receipts as was required. Apart from these non-specific assertions he did not provide any evidence that they had occurred or that he or anyone else had raised any grievances. He had also not appealed his final written warning despite saying at the hearing that a white employee had also been caught asleep and had not been disciplined.
25. The Tribunal finds that the Respondent had not dismissed the Claimant in May 2020 for his previous offence of sleeping at work but had instead given him a final written warning to take into account his long service. The Tribunal therefore finds that if the Respondent had wanted an excuse to dismiss him, in fact because of his race, the Respondent would have done so at that point, but it did not.
26. Taking into account (a) the existence of the final written warning dated 13<sup>th</sup> May 2020 (which the Claimant did not appeal) (b) the Claimant's acceptance that at the very least he had been absent from work having already booked in and having said he was present on site and his acceptance that he did not let the Respondent know he was absent or explain it until asked later (c) the absence of any evidence to support the Claimant's generalised claims of poor treatment of black members of staff the Tribunal finds that there are no facts which the Claimant has shown which would mean that the burden of proof has shifted to the Respondent to explain why he was dismissed. The Claimant has not discharged the burden on him to show facts from which an inference of discrimination could be drawn.
27. The Tribunal finds that that the only reason for his dismissal was the events of 4th June 2020 and finds that the Claimant's race played no part in his dismissal, either a dismissal because of his race or because he was dismissed as a black employee for being absent having said he was at work when a white employee who was absent having said they were at work would not have been dismissed.

#### Holiday pay

28. The Tribunal finds that there was no contractual term transferring with the Claimant from VSG, that he was entitled to be paid the entire year holiday entitlement when he left employment, irrespective of when in the holiday year he left. There was nothing in the VSG terms to suggest that and in fact the terms say (page 20,26) that any holiday taken in excess of their accrued entitlement when an employee leaves can be recouped, which suggests the opposite.
29. The Tribunal therefore finds that the Claimant was entitled to be paid for 6.99 days accrued holiday pay on termination. The Respondent was unable to clarify the basis of the 45.47 hours holiday pay paid on 10th July 2020 (page 85); on the face of it that represents a day's pay of 6.5 hours. That is not the calculation for someone working

a 48 hour week in the Claimant's previous VSG terms (page 26) which calculates a day's pay as 1/5 of the employee's normal weekly hours (48 for the Claimant). It is also not the calculation set out in the Respondent's handbook which appears to instead work on the basis of a 40 hour week if somebody works 40 hours or more per week (page 34).

### Relevant law

#### Unfair dismissal

30. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal). Conduct is a fair reason for dismissal (s98(2)). The relevant test in *BHS v Burchell [1978] IRLR 379* for conduct dismissals is that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation.
31. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439* applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt [2003] IRLR 23*.
32. *Shrestha v Genesis Housing Association Limited [2015] I.R.L.R. 399* considered the extent to which an employer is required to investigate possible defences raised by the employee in order to meet the *Burchell* test, deciding that this depended on the circumstances as a whole.
33. It is not for the Tribunal to decide whether it would have dismissed the Claimant or to substitute its own view as to what should have happened but to assess the fairness of the dismissal within the band or range of reasonable responses test taking into account what was in the employer's mind at the time of the dismissal and the material before the employer at that time.
34. Where an employee asserts that the reason given for dismissal by the employer is not the real reason, they must produce some evidence supporting this positive case. It is sufficient for the employee to challenge the evidence produced by the employer to show its reason for dismissal and produce some evidence of a different reason. Having heard the evidence on both sides, it is for the Tribunal to consider all the evidence as a whole and to make a primary finding of fact on the reason(s) for dismissal. This may be on the basis of direct evidence or by reasonable inferences from the primary facts established by the evidence (*Kuzel v Roche Products Ltd [2008] IRLR 530*).
35. The circumstances in which a Tribunal will re-examine (ie 'go behind') a previous final written warning are very limited and it only do so in exceptional circumstances if the employee has not appealed it (*Davies v Sandwell MBC [2013] IRLR 374*). The Tribunal will consider whether the warning was issued in good faith, whether the employer was on the face of it entitled to impose it and whether or not it was obviously inappropriate.

#### Compensation for unfair dismissal

36. The compensatory award is calculated under s123 ERA 1996 and is such sum as

the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained in consequence of the dismissal in so far as that loss is attributable to the action of the employer.

37. An employee is under a duty to mitigate his losses by making reasonable efforts to find other work. The burden of proving a failure to mitigate is on the employer. In calculating an employee's loss this duty must be considered by the Tribunal (s123(4) Employment Rights Act 1996).
38. It is for the employer to adduce evidence that the employee would have been dismissed in any event if a fair procedure had been followed or to support an argument that the employee would not have been employed indefinitely (a *Polkey* deduction) (*Compass Group v Ayodele [2011] IRLR 802*). *Software 200 Limited v Andrews [200] ICR 82* identified the need to consider whether it is not possible to reconstruct what might have happened such that no sensible prediction can be made.
39. s207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that an award may be reduced or increased by up to 25% where there has been an unreasonable failure by a party to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015), if just and equitable in all the circumstances to do so. This can apply to a breach by either party of its obligations under the ACAS Code.
40. The basic award for unfair dismissal can be reduced under s122(2) Employment Rights Act 1996. This is where any conduct of the employee before dismissal was such that it would be just and equitable to reduce the amount of the basic award in which case the Tribunal shall make that reduction. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*).
41. The compensatory award for unfair dismissal can be reduced under s123(6) Employment Rights Act 1996. This is where the Tribunal finds that the dismissal was caused or contributed to by any action of the employee before the dismissal in which case the Tribunal shall reduce the compensatory award by such proportion as it considers just and equitable. The conduct must be blameworthy (*Nelson v BBC (No 2) 1979 IRLR 346*) but does not have to amount to gross misconduct or a breach of contract (*Jagex Ltd v McCambridge [2020] IRLR 187*).

#### Equality Act 2010 - Race discrimination

42. The Claimant's claim that he was subjected to direct discrimination because of race. Race is a protected characteristic under s9 Equality Act 2010.
43. It is unlawful for employers to discriminate against employees, harass or victimise them under s39 and s40 Equality Act 2010. Where a comparator is necessary, they must be the same in all material respects, apart from the protected characteristic, as the claimant (s23 Equality Act 2010).
44. The determination of whether treatment is because of or related to a protected characteristic or protected act requires a Tribunal to consider the conscious or sub-conscious motivation of the alleged discriminator. This element will be established if

the Tribunal finds that a protected characteristic formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877). In cases where the less favourable treatment complained of is not inherently related to a protected characteristic it is necessary for the Tribunal to look in to the mental processes of the alleged discriminator in order to determine the reason for the conduct (*Amnesty International v Ahmed* [2009] IRLR 884). If the Tribunal finds that treatment was because of a protected characteristic (whether consciously or subconsciously) it amounts to direct discrimination.

45. When considering a discrimination claim the Tribunal must take into account (where relevant) the statutory Code of Practice on Employment (2011) issued by the Equality and Human Rights Commission.

#### The burden of proof under the Equality Act 2010

46. s136 of the Equality Act 2010 provides as follows:
  - (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.
47. This provision requires a claimant to first prove facts consistent with their claims: if the claimant does this then the burden of proof secondly shifts to the respondent to prove that it did not, in fact, commit the unlawful act in question (*Igen v Wong* [2005] IRLR 258).
48. The Supreme Court in *Royal Mail Group v Efofi* [2021] UKSC 33 confirmed that there is still a burden on a claimant at the first stage and that at that first stage all the evidence should be considered whether it comes from the claimant or from the respondent in order to rebut or undermine the claimant's case. The only thing which should not be considered at that first stage is the respondent's explanation for the treatment. A claimant must prove however on the balance of probabilities the matters they seek to have found as facts, and from which the inference of discrimination is to be drawn (in the absence of any other explanation).
49. The respondent's explanation at the second stage must be supported by cogent evidence showing that the claimant's treatment was in no sense whatsoever because of race or a protected act (*Fecitt v NHS Manchester* [2012] ICR 372)

#### The drawing of inferences in discrimination claims

50. An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. The Tribunal has borne in mind that discrimination may be unconscious and people rarely admit even to themselves that, for example, considerations of race have played a part in their acts. The task of the Tribunal is to

look at the facts as a whole to see if a protected characteristic played a part (*Anya v University of Oxford* [2001] IRLR 377). The Tribunal has considered the guidance given by Elias J on this in the case of *Law Society v Bahl* [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799), in particular that unreasonable behaviour is not of itself evidence of discrimination or harassment though a tribunal may infer discrimination from unexplained unreasonable behaviour (see *Madarassy v Nomura International plc* [2007] IRLR 246).

#### Direct discrimination

51. s13 Equality Act 2010 provides:

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.

52. This provision requires a Tribunal to decide the following:-

- a. Has there been treatment?
- b. Is that treatment less favourable than the treatment which was or would have been given to a real or hypothetical comparator?
- c. Was that difference in treatment because of a protected characteristic?

#### Holiday pay

53. Under Regulation 14 of the Working Time Regulations an employee is entitled to be paid for holiday which has accrued but not been taken before the termination date. The amount to be paid can be agreed in a written agreement (called a relevant agreement); if it is not, the Regulations set out how it is to be calculated which is by reference to the proportion of the leave year which the employee has completed.

#### Reasons

54. Taking the above findings of fact into account the Tribunal concludes that the only reason for the Claimant's dismissal was his conduct on 4<sup>th</sup> June 2020. Conduct is a fair reason for dismissal.

55. The Claimant's dismissal was unfair under s98 Employment Rights Act 1998 because it was not within the band or range of reasonable responses. The Respondent had not conducted a reasonable investigation within that range, had not set out in his dismissal letter clearly to the Claimant why he was being dismissed and had impermissibly restricted his appeal rights by telling him he had to produce fresh evidence/raise a new issue in order to be able to appeal.

56. The Tribunal concludes that the Claimant however could fairly have been dismissed by the Respondent had it followed a fair procedure, and that would have extended his employment by three further weeks. This means that the Claimant's compensatory award for unfair dismissal will be limited to three weeks loss of earnings.

57. The Respondent also unreasonably breached the ACAS Code of Practice paras 22 and 26. This means that the Tribunal can consider an increase to the Claimant's compensation by up to 25%.
58. The Tribunal concludes taking into account the above findings of fact that the Claimant's basic award should be reduced by 75% because of conduct prior to his dismissal, such conduct meaning that it is just and equitable to reduce the basic award.
59. The Tribunal concludes taking into account the above findings of fact that the Claimant's compensatory award should be reduced because his dismissal was caused or contributed to by his actions and concludes that the reduction amount which is just and equitable is a reduction of 75%.
60. Taking the above findings of fact into account the Claimants claim for direct race discrimination is dismissed
61. The Claimant's claim for accrued but untaken holiday pay remains to be decided and is subject to the Respondent clarifying the basis on which it says the holiday pay paid on 10th July 2020 represents 6.99 days pay for the Claimant.
62. A remedy (ie compensation) hearing was booked with the parties for 28th January 2022 (one day – CVP video hearing). Orders are attached setting out what needs to be done to prepare for that hearing. The Respondent identified that it might argue a failure to mitigate, depending on the documents the Claimant produced to show what he had done to look for a new job. The Tribunal's attached Order only covers the first month after dismissal because it has limited the period of loss to three weeks. The Tribunal is not asking the Claimant to produce a schedule of loss again because from his email dated 28<sup>th</sup> October 2021 it seemed he struggled with this and it was evident at the hearing that the Tribunal will need to do the calculations of his net and gross weekly pay for him, taking into account any views of the Respondent on those calculations. The Orders also cover the apparent mismatch between the claimed original start date at VSG – it matters because if the Claimant is right that he started at VSG on 10<sup>th</sup> June 2010 (and not on 1<sup>st</sup> July 2010 according to the Respondent) he had accrued an extra year's service by his dismissal on 29<sup>th</sup> June 2020, relevant to the calculation of his basic award.
63. The Tribunal has set out above some parameters within which the Claimant's unfair dismissal compensation will be calculated, if he pursues it and is not successful in claiming reinstatement (which he claims in his claim form). These may assist the parties to settle the claim if the holiday pay issue can also be clarified with the Claimant. As the Claimant is not represented the parties may wish to use ACAS to help with any such settlement discussions.
64. The following information (which does not form part of the judgment) is given to assist the Claimant because he is not represented and because he had some difficulty at the hearing dealing with documents and understanding the relevant legal and factual issues in his claim.

**To Mr Badu**

65. You have won your claim for unfair dismissal. This is because the Tribunal thinks that the Respondent got the procedure wrong when they dismissed you. However the Tribunal thinks that you would have been dismissed anyway even if they had got the procedure right. The Tribunal has already decided to have got that procedure right would have taken a further three weeks. Those three weeks pay is what you have lost in earnings.
66. You have said in your claim form that if you won your claim you want to get your old job back. This is called reinstatement. You can ask the Tribunal to consider that at the next hearing but the Tribunal does not have to order the Respondent to reinstate you even though you may want to be, it can instead order the Respondent to pay you compensation. It is unlikely that a Tribunal would order reinstatement when the relationship between the parties has broken down and where the employee has contributed to their own dismissal.
67. Unfair dismissal compensation is made up of two parts. The first part is called the basic award and is a payment calculated looking at your length of service, your age and your weekly gross pay. The basic award can be reduced because of your conduct and the Tribunal has already decided that your conduct means that your basic award will be reduced by 75%.
68. The second part of unfair dismissal compensation is called the compensatory award. That is a payment looking at your net losses because you lost your job. The Tribunal has already decided that you would have been dismissed anyway after a further period of three weeks. This means that the starting point for your compensatory award is three weeks loss of your net earnings at the Respondent. From that starting point the Tribunal then can consider increasing your compensation by up to 25% for breach of the ACAS Code of Practice (one of the procedures the Respondent got wrong). After that your compensatory award will be reduced because of your conduct and the Tribunal has decided that this reduction will be 75%.
69. You may be able to talk to the Respondent about possibly being able to agree the compensation you are owed because of the guidelines the Tribunal has already given. This is called settling the claim. You may wish to take advice eg from the CAB and ACAS is available to help with discussions and reaching an agreement, if you want to do so. You do not have to do so but if you did agree with the Respondent the amount of your unfair dismissal compensation and any outstanding holiday pay and you settled the claim via ACAS, the next hearing on 28th January 2022 about compensation would not be necessary. If however you want to continue to claim reinstatement to your old job that will mean the next hearing is necessary. You will see in the orders attached that you are asked to confirm whether you still want to be reinstated – this is so that the Respondent knows to prepare for this issue at the next hearing if it is still relevant.
70. The Respondent may also be able to clarify with you what it says about your holiday pay. The Tribunal has decided that you are owed 6.99 days pay- the only issue which remains is whether the payment the Respondent made to you on 10<sup>th</sup> July 2020 in fact represents 6.99 days' pay. Your claim for a full year's entitlement has not succeeded.

71. You have not won your claim for race discrimination and there will therefore be no extra compensation for that claim.
72. Please read the orders attached so that you know what you need to do to prepare for the next hearing, assuming your claim is not settled. Please remember that you should copy the Respondent in on anything you send to the Tribunal. At the next hearing if you want someone to help you, can have a friend or relative with you for support.

**Employment Judge Reid**  
**Date: 19<sup>th</sup> November 2021**