



EMPLOYMENT TRIBUNALS

Claimant: Mr Deepak Subbkrishna

Respondent: Royal Mail Group Limited

Heard at: Reading

On: 8-10 Nov 2023, 16–18 Jan 2024

Before: Employment Judge Reindorf KC
Mrs E Jones
Ms J Smith

Representation:

Claimant: In person

Respondent: Mr R Chaudhry (solicitor)

RESERVED JUDGMENT

- (1) The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.
- (2) The complaint of direct race discrimination is not well-founded and is dismissed.
- (3) The complaint of unauthorised deductions from wages is not well-founded and is dismissed.

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INTRODUCTION

1. In an ET1 presented on 12 October 2023 (case number 3321231/2021) and two ET1s presented on 13 October 2021 (case numbers 3321233/2021 and 3321234/2021) the Claimant brought complaints of unfair dismissal, race discrimination and unauthorised deductions from wages against the Respondent and three individual named Respondents. The claims against the named Respondents were struck out on 28 April 2022.
2. The complaints relate to the Claimant’s summary dismissal on 21 August 2021 from his employment by the Respondent as an ML4 Work Area Manager on the Early Shift at the International Logistics Centre (“ILC”) in Slough. The Respondent says that the Claimant was dismissed for gross misconduct, having become involved in a physical fight with a junior colleague, Sajeevkumar Sathyadevan (Operational Postal Grade (“OPG”)), in the ILC car park during his break on 9 May 2021. The Claimant’s case is that Mr Sathyadevan was the aggressor in the incident.
3. The Respondent denies the claims.
4. A preliminary hearing was held by telephone on 23 August 2022. The issues were broadly identified as a claim for ordinary unfair dismissal and a claim for direct discrimination with the protected characteristic of race, the Claimant's race being Asian. There also remains a claim for unauthorised deductions from wages, which relates to a recognition payment.

THE EVIDENCE AND HEARING

5. The hearing was conducted in person over three days in Reading Employment Tribunal on 7 to 9 November 2023, and then a further three days by CVP on 16 to 18 January 2024.
6. The Tribunal heard evidence from Mr Mazar Iqbal (Early Shift Manager) and Ms Anna Walsh (Independent Casework Manager) for the Respondent. The Claimant gave evidence on his own behalf. All witnesses produced written witness statements and were subjected to cross-examination. There was an agreed trial bundle consisting of 421 pages. Several documents were disclosed and put before the Tribunal during the course of the hearing.
7. During the course of the Claimant's cross examination it emerged that he had not disclosed a recording that he had taken of his conduct hearing. We adjourned and relisted the hearing in order for the recording to be produced and transcribed. At the reconvened hearing the Respondent made a strike out application on the basis that the Claimant had deliberately withheld disclosure of the recording. We dismissed the application and gave reasons orally. A judgment on that application will be sent to the parties separately.

THE ISSUES

8. It was agreed at the outset that the issues for the unfair dismissal and direct race discrimination complaints were as follows:

- 1. *Unfair dismissal (Employment Rights Act 1996 s.94(1))***

- 1.1. Has the Respondent shown that the reason for the dismissal was a reason relating to conduct?*

- 1.2. If so, did the Respondent act fairly in the circumstances of the case in treating that reason as sufficient reason to dismiss the Claimant? The Claimant says that the following aspects of the case were unfair:*

- 1.2.1. The reasons for the Claimant's suspension were added to without further evidence having come to light.*

- 1.2.2. Mr Iqbal, the investigating manager, allowed other people to take over the investigation, including the dismissing manager Ken Coke.*

- 1.2.3. Mr Iqbal prompted witnesses.*

- 1.2.4. The documents passed by Mr Iqbal to Mr Coke were incomplete.*

- 1.2.5. Mr Iqbal did not make a summary of the witness evidence to pass on to Mr Coke.*

- 1.2.6. Mr Coke said during the Claimant's conduct interview that he*

was going to reinterview a witness, but did not do so.

- 1.2.7. *Mr Coke's dismissal letter included large portions of the interview he had conducted with the security guard during the investigation.*
- 1.2.8. *The witness evidence did not support the conclusion that the Claimant had hit another employee.*
- 1.2.9. *Mr Coke's decision to dismiss the Claimant was excessive.*
- 1.2.10. *At appeal, Ms Walsh believed other witnesses over the Claimant for no good reason.*
- 1.2.11. *At appeal, a lot of the Claimant's paperwork was not read.*
- 1.2.12. *The Claimant was treated inconsistently with the way in which Trevor Reynolds and James King were treated in similar circumstances.*
- 1.3. *If the Claimant was unfairly dismissed, what are the chances that he would have been dismissed in any event even if the unfairness had not occurred (Polkey)?*
- 1.4. *Did the Claimant cause or contribute to his dismissal? If so, to what extent?*

2. Direct race discrimination (Equality Act 2010 section 13)

- 2.1. *In dismissing the Claimant and in upholding his dismissal on appeal, did the Respondent:*
 - 2.1.1. *treat the Claimant less favourably than it treated Trevor Reynolds and / or James King; and*
 - 2.1.2. *if so are Trevor Reynolds and / or James King appropriate comparators; and*
 - 2.1.3. *if so, was that less favourable treatment because of the Claimant's race?*
- 2.2. *In the alternative, in dismissing the Claimant and in upholding his dismissal on appeal, did the Respondent treat the Claimant less favourably than it would have treated an appropriate hypothetical comparator, and if so was that less favourable treatment because of the Claimant's race?*

FINDINGS OF FACT

9. The Claimant was employed by the Respondent from 2 June 2008 until he was dismissed summarily with effect from 21 August 2021. His job at the time of his dismissal was ML4 Work Area Manager on the Early Shift at the International Logistics Centre ("ILC"). Prior to the events which led to his dismissal, he had a clean disciplinary record.

10. The Respondent is a very large, national business with around 150,000 employees.
11. The Respondent has a Conduct Policy which sets out a procedure for the formal investigation and determination of conduct issues. It states that the employee's manager will conduct "a prompt and detailed investigation of the facts" in the first instance. This may include a "fact finding meeting" with the employee. It states:

Following the fact-finding meeting the manager should consider the information available and decide whether the case can be dealt with informally, formally or closed if there is no case to answer...

If the manager who conducts the fact finding feels there is a case to answer; they must decide whether, if the allegation is proven, the penalty appropriate would be likely to be within or outside their authority. If they feel a major penalty is a possible outcome, they must at that stage pass it to another manager, normally the second line manager.

12. Under the Conduct Policy "major penalties" may usually only be given by an employee's second line manager of at least Royal Mail Executive Manager Level 2 grade.
13. The Conduct Policy then makes provision for a formal conduct meeting and an appeal. The employee may be subjected to a precautionary suspension during the process. An employee may be summarily dismissed for gross misconduct, which includes "violence".
14. On 6 December 2016 an incident occurred between two of the Respondent's employees, Trevor Reynolds and Usman Asif. Mr Reynolds informed Mr Asif that a complaint had been made against him. The two began to argue and Mr Reynolds "manhandled" Mr Asif into a trailer. Mr Reynolds was not suspended. The matter was investigated under the Respondent's bullying and harassment procedure and a finding was made that Mr Reynolds did pull Mr Asif into the trailer, but that this was a non-violent act and was not an assault.
15. In March 2020 Mr Iqbal investigated a conduct complaint against another employee, James King. Mr King was accused of using abusive and offensive language towards a Border Force employee on 14 November 2019, and of intimidating her and making unwanted physical contact with her by touching her on the shoulder in an attempt to get her to move. Mr King was found to have committed gross misconduct and issued with a 24 month suspended dismissal and a disciplinary transfer.
16. On 15 December 2020 the Claimant received a letter from a colleague, Claude Forbes, which stated:

As requested this letter, throughout this week I have been in the process of negotiating my position with MR2020 and with Ken Coke, I was Shocked when I spoke to Ken coke about us swapping shifts.

You know I am trying to negotiate my new position to late shift, and I suggested swapping with you. He (Ken Coke) was adamant that he did not want you in the building (ILC).

You should be careful; it seems Ken is after you for whatever reason.

17. We make findings of fact about the altercation on 9 May 2021 between the Claimant and Mr Sathyadevan below. In general, we accepted the Claimant's account of the altercation. The Respondent did not call Mr Sathyadevan or any witness to give direct evidence about what happened, despite the fact that it argued that the Claimant contributed to his own dismissal because of his actions during the altercation. We found that the evidence given by Mr Sathyadevan during the disciplinary process was not credible and had plainly been recreated in hindsight in order to seek to absolve himself of blame. We did not find the evidence given by the witness Ali Hussein (OPG) to the disciplinary investigation to be reliable.
18. We make the following findings of fact about what took place on 9 May 2021:
 - 18.1. During his break at around 3pm the Claimant went to sit in his car in the ILC car park. His car was not in an allocated space. It was parked in front Mr Sathyadevan's car. The cars were facing in the same direction with a space between the back of the Claimant's car and the front of Mr Sathyadevan's car. There was sufficient space for Mr Sathyadevan to manoeuvre his car out of its space.
 - 18.2. Whilst the Claimant was sitting eating in his car with the passenger window and door open, Mr Sathyadevan came into the car park and got into his car. He started to sound his car horn insistently. At first the Claimant did not know why the car horn was being sounded. Mr Sathyadevan got out of his car and stood near the space between the two cars. He was shouting and swearing, and was clearly annoyed about the proximity of the Claimant's car to his.
 - 18.3. At around this point Mr Hussein arrived at the scene. He was due to get a lift home with Mr Sathyadevan. Mr Sathyadevan got back into his car and Mr Hussein helped him guide it out of the space. Mr Sathyadevan continued to shout and swear. The Claimant got out of his car to approach Mr Sathyadevan's car. Mr Hussein attempted to dissuade him from doing so. However the Claimant continued to approach Mr Sathyadevan's car.
 - 18.4. The Claimant deliberately went to the passenger side of Mr Sathyadevan's car as he did not want to stand over Mr Sathyadevan in a manner which could be interpreted as intimidating. The passenger door was open, because Mr Hussein had been about to get in. The Claimant bent down and leaned in to speak to Mr Sathyadevan and asked him to stop swearing.

- 18.5. The Claimant chose to confront Mr Sathyadevan directly rather than report his behaviour. The Claimant was senior to Mr Sathyadevan and a manager, so it was appropriate for him to address Mr Sathyadevan's poor behaviour in the moment. He attempted to do so in a non-aggressive manner by approaching Mr Sathyadevan's car from the passenger side.
- 18.6. During this exchange the Claimant said that if Mr Sathyadevan did not stop swearing, he would swear back at him. Mr Sathyadevan did not stop swearing, and the Claimant then repeated back to him at least one of the swearwords that he had been using. The Claimant said in evidence before us that he had done this because he had read that mirroring bad behaviour can de-escalate a situation. We find that this was a genuine de-escalation attempt on the Claimant's part, although it did not work. We find also that the Claimant was heavily provoked by Mr Sathyadevan's unacceptable conduct.
- 18.7. Mr Sathyadevan continued to swear. He then struck out at the Claimant with his left hand and hit him near his eye. He grabbed the collar of the Claimant's jacket and pulled him part-way into the car. We find that in an ordinary car the distance between the driver's seat, where Mr Sathyadevan was located, and the open passenger door, beside which the Claimant was bending down, would be small enough for Mr Sathyadevan to be able to reach across and grab the Claimant.
- 18.8. The Claimant tried to pull his upper body out of the car, but was unable to do so as Mr Sathyadevan was pulling at his jacket. The Claimant tried to slip out of his jacket by lifting his arms so that it would come off over his head, and for several seconds his face was obscured by the jacket so that he was unable to see what else was happening. He managed to get out of the coat and move away, leaving Mr Sathyadevan in possession of his jacket.
- 18.9. Mr Sathyadevan then got out of his car. He put the Claimant's jacket on the ground and stood on it. The Claimant asked for his jacket back several times, and Mr Hussein also said a few times to Mr Sathyadevan that he should return the jacket. Mr Sathyadevan continued to swear at the Claimant. He put the Claimant's jacket back into his own car, on the driver's seat.
- 18.10. Ahmed Ismail arrived on scene at around this point. He was on his way to catch the bus, but was called to the scene of the altercation by Mr Hussein.
- 18.11. Mr Sathyadevan moved away and the Claimant managed to retrieve his jacket. As he was putting it on, Mr Sathyadevan grabbed the jacket again from behind and unbalanced the Claimant. The Claimant managed to regain his balance and get back into his car, where he phoned the police.

- 18.12. During the altercation the security guard, Mohammed Khan, had been watching from behind the security desk in a building some distance from the scene. He saw that a scuffle took place between the Claimant and Mr Sathyadevan, and that another person was present. He could not hear what was said. Mr Khan called Parminder Sethi (Acting Shift Manager), who came to the car park and spoke to Mr Sathyadevan.
- 18.13. Mr Sathyadevan had a cut on his finger. We find that this injury had been caused by him catching his finger on the zip of the Claimant's jacket when he grabbed at the Claimant from inside his car. Mr Sathyadevan had also sustained some minor scratching to the side of his neck. We find that this was very likely to have occurred when the Claimant was flailing around in the car trying to get out of his jacket.
- 18.14. A few moments later Mr Sathyadevan drove away with Mr Hussein in his car. Mr Ismail left at around this time to catch his bus.
- 18.15. The Claimant went to speak to Mr Sethi, who said that Mr Sathyadevan had asked him for a plaster and said that he had caught his finger on the Claimant's zip. The Claimant went back to his work area, where he told Albert Lamti (OPG) that he had been assaulted. Mr Lamti took photographs of the Claimant's injuries, which included a swollen temple, caused by Mr Sathyadevan when he struck out at the Claimant from inside his car. The Claimant was given some first aid assistance.
19. We make the following findings of fact about the disciplinary process which followed the altercation:
- 19.1. On 10 May 2021 Mr Sethi sent an email to Haroon Ashraf about the altercation, copying in Mr Coke and Mr Iqbal.
- 19.2. On 11 May 2021 the Claimant was suspended by Mr Coke. He was sent a letter of suspension the following day which stated that the reason for the suspension was "alleged assault of an OPG".
- 19.3. On 22 May 2021, Mr Iqbal interviewed the Claimant. The Claimant had prepared a written account for this meeting.
- 19.4. On 26 May 2021 the Claimant's suspension was renewed. Attached to the letter was a report which stated that the reason for the renewal was as follows:

Alleged inappropriate behaviour.

Alleged serious breach of contract where there is a reasonable belief that the serious breach might be repeated and / or there is risk to people, property, mail or the good image of Royal Mail Group.

The investigation may be hampered where the employee remains at work.

- 19.5. On 26 May 2021 Mr Khan was interviewed by Mr Coke and Mike Mahoney (Internal Security Manager). Notes were taken by Salomi Mathews (OPG, Mr Coke's Personal Assistant). Mr Khan said that the incident had been "a punch up" and that it had lasted for about 15 minutes. He said:

I could see Deepak having a heated argument with Sajeevkumar and another guy was near them watching the incident over moving his car, that's what I think, but I didn't hear anything from where I was sitting the reception desk.

- 19.6. On 27 May 2021, Mr Iqbal interviewed Mr Hussein and Mr Ismail. In his interview Mr Hussein did not suggest that the Claimant had initiated any violence or abuse towards Mr Sathyadevan. He said:

- a. After he arrived, Mr Sathyadevan was the first to swear. Mr Sathyadevan had used the word "motherfucker". The Claimant had then come out of his car and asked Mr Sathyadevan "are you calling me a motherfucker?"
- b. There was about 30cm between the cars.
- c. After that the Claimant and Mr Sathyadevan started "swearing at each other". The swearing lasted for about a minute.
- d. Both Mr Sathyadevan and the Claimant went back to their cars and both were still swearing.
- e. Mr Sathyadevan's front passenger window was open and the Claimant came round and leaned into it. He then opened Mr Sathyadevan's passenger door and leaned into it. They both carried on swearing. He saw their arms moving.
- f. He saw Mr Ismail going to the bus stop and called him over to help. Mr Ismail had not seen the altercation but he saw the Claimant's jacket.
- g. The Claimant had been wearing his jacket when he went into the car, but not when he came out. Mr Hussein did not know how the jacket came off because he could not see.
- h. Mr Hussein saw the Claimant retrieve his jacket from the floor near the driver's door of Mr Sathyadevan's car. He saw Mr Sathyadevan push the Claimant, who nearly lost his balance. He said "everything was happening so fast".
- i. Mr Sathyadevan had a cut on his finger but Mr Hussein did not remember seeing any other injuries.

- 19.7. On 1 June 2021 Mr Iqbal interviewed Mr Sethi. He said that when he arrived at the scene of the altercation, Mr Sathyadevan had told him that the Claimant had punched him through the car window. He also stated that Mr Sathyadevan had said that he did not want to take the matter further, and that the Claimant had told him that Mr Sathyadevan had hit him but also admitted to hitting Mr Sathyadevan back.
- 19.8. On 7 June 2021, Haroon Ishraf interviewed Mr Sathyadevan, who had also been suspended. The interview took place as part of Mr Sathyadevan's own disciplinary process, but was utilised as evidence in the Claimant's disciplinary process. Mr Sathyadevan said that on 9 May:
- a. When he arrived in the car park he did not ask the Claimant to move his car because the Claimant was a person "who can manipulate and fabricate things".
 - b. He saw another colleague, Ravinder Hothi, in the car park. However, Mr Hothi did not see or hear what had happened.
 - c. As he was approaching his car he heard the Claimant swearing at him. He did not respond.
 - d. He tried to get his car out but couldn't, so he sounded his car horn twice but the Claimant did not respond by moving his car. Mr Sathyadevan asked him through the window to move his car.
 - e. When Mr Hussein arrived he got out of the car to talk to him. They examined the cars together. There was a two to three inch gap between the cars.
 - f. The Claimant got out of his car and swore at him again. He backed off because the Claimant was not wearing a face mask. Shortly thereafter the Claimant challenged him to fight, which he ignored.
 - g. He got back in the car and Mr Hussein helped him navigate it out of the space.
 - h. He was looking for his keys because he may have dropped them, then "I opened the door and at that time [the Claimant] open the passenger door and he quickly got in my car and hit me on the left side of my jaw". The Claimant continued to act violently while Mr Sathyadevan tried to hold him off. At one point Mr Sathyadevan pulled the Claimant's jacket sleeves down over his hands, while the Claimant "pushed up and down with his hands", and then the Claimant tried to move back and his jacket came off.

- i. The Claimant had come to the driver's side of the car and got his jacket. Mr Sathyadevan tried to defend himself and pushed the Claimant, who fell down and then got back up and tried to fight him again.
- 19.9. By letter dated 15 June 2021 Mr Iqbal informed the Claimant that he had passed the case up to Mr Coke for consideration of further action.
- 19.10. The Claimant was subsequently invited to a formal conduct meeting on 6 July 2021, to be chaired by Mr Coke. The charge set out in the letter was:
- Violent and abusive behaviour towards Royal Mail employee Sajeev Sathyadevan on 9th May 2021 around 1500 hours in ILC car park.*
- 19.11. The Claimant attended the conduct interview on 6 July 2021 accompanied by a union representative. Notes were taken by Ms Mathews. During the conduct interview Mr Coke agreed that Mr Hussein's evidence was vague, and undertook to reinterview him before reaching a decision. He repeated this undertaking several times.
- 19.12. Following the conduct interview the notes were sent to the Claimant for review under cover of a letter dated 15 July 2021. The notes did not contain Mr Coke's undertaking to reinterview Mr Hussein. The Claimant made extensive amendments. These included adding the following words, attributed to Mr Coke:
- I have to go back and ask Ali [Hussein] 'you must have seen it all or seen nothing'. As I see it Ali's statement is quite vague.*
- 19.13. The Claimant returned the amended notes to Mr Coke under cover of a letter dated 21 July 2021. He did not hear back from Mr Coke about his amendments, and assumed that they were agreed.
- 19.14. Mr Coke did not reinterview Mr Hussein before dismissing the Claimant by letter dated 20 August 2021 to which he attached a short report listing the key events in the disciplinary process.
- 19.15. In the dismissal letter the reason for the dismissal was stated to be:
- Gross Misconduct – Violent and abusive behaviour*
- (in that on 09/05/2021 you were involved in a fight with another Royal Mail employee).*
- 19.16. The letter set out Mr Coke's findings of fact, which were in their entirety:

I have reason to believe that an argument developed as a result of you not moving your car when asked via Sajeev honking his horn. You stated to Maz Iqbal you were in your car with the window and drivers door open.

You stated I heard him (Sajeev) honk his horn this would indicate something is wrong especially with a car parked behind you. As a result of this very minor issue words were exchanged between both parties which resulted in you entering Sajeevs car which ultimately led to a fight / scuffle in the car.

I have no doubt that words were exchanged.

You went from your car over towards Sajeev who was in his car.

A witness states you got into the car whilst having an [sic] heated argument with Sajeev after first leaning through the window.

You state Sajeev dragged you into his car but he was sitting in the drivers seat, this could of [sic] only been possible if you were leaning into or in the car.

A witness states you opened the door.

There was a second altercation between both parties when you attempted to retrieve your jacket from Sajeev.

You claim in the interview I held with you that you did not enter Sajeev's car and that you were standing by the door only if so how can he have reached over and grabbed you given the space that would have been between you both.

- 19.17. The letter stated that the Claimant could appeal within three working days.
- 19.18. Mr Coke handed the dismissal letter to the Claimant on 20 August 2021. At the back of the letter was a slip for the employee to sign to acknowledge receipt and to indicate whether he wished to appeal and if so on what grounds. Mr Coke asked the Claimant to sign the slip and to set out his grounds of appeal on it there and then. The Claimant signed the slip and indicated that he wished to appeal. He felt rushed and under pressure, and had not had sufficient time to consider the disciplinary outcome and his potential grounds of appeal. The grounds of appeal he stated included that the investigation process had not been properly followed, that there had been a breach of confidentiality and that there was unconscious bias against him. He did not list race discrimination.
- 19.19. The appeal was allocated to Anna Walsh (Independent Case Manager). She had also been allocated to hear an appeal brought

by Mr Sathyadevan, who had been dismissed following a disciplinary hearing on 25 June 2021.

- 19.20. The Claimant sent documents to Ms Walsh in support of his appeal, including a letter on 13 September 2021 in support of his claim that there had been a breach of confidentiality. He stated that Ms Mathews was not a trained investigator and should not have interviewed Mr Khan nor had access to “this confidential information”. He also said that he had been sent a document which contained Mr Sathyadevan’s home address, and was concerned that his address had likewise been shared with Mr Sathyadevan. He said that this was a GDPR breach.
- 19.21. The appeal hearing took place on 14 September 2021. It was conducted as a rehearing of the case. The Claimant was accompanied by his union representative and there was no notetaker. During the hearing the Claimant took Ms Walsh through the interview notes in detail and pointed out inconsistencies. Ms Walsh referred on several occasions to things said by Mr Sathyadevan in his disciplinary appeal hearing, which had taken place two weeks previously on 1 September 2021.
- 19.22. Following the appeal hearing Ms Walsh conducted further investigations. On 5 October 2021 she sent the Claimant some documents arising from her further investigations. In her covering letter she stated that one of these documents consisted of excerpts from the notes of Mr Sathyadevan’s appeal hearing of 1 September 2021. However, these were not in fact enclosed with the letter. That was clear from the Claimant’s (undated) letter in response, which commented in some detail on the other documents sent by Ms Walsh but not on the notes of Mr Sathyadevan’s appeal hearing. Ms Walsh did not respond to the Claimant’s letter.
- 19.23. Ms Walsh upheld the dismissal by letter dated 15 October 2021. In her report:
- a. She found that there was mutual dislike between the Claimant and Mr Sathyadevan.
 - b. She relayed an account of the altercation in the car park which did not identify who had initiated the violence. Nor did it state that any swearing had taken place.
 - c. She found on the balance of probabilities that the Claimant was responsible for Mr Sathyadevan’s injuries and vice versa, and that the Claimant demonstrated violent behaviour.
 - d. She stated that when Mr Sathyadevan sounded his horn, “any reasonable person” would have assumed that they should move their car to allow him to get his car out of the space.

e. She found that Mr Hussein's evidence was not contradictory.

19.24. On the procedural errors complained of by the Claimant, Ms Walsh concluded that he had been trained on the conduct policy, so she found it "difficult to accept" that when Mr Iqbal passed the case up to Mr Coke, the Claimant would not have understood "what was happening with his conduct case", despite the fact that Mr Iqbal's letter did not make this explicit.

20. In July 2021 the Respondent issued a Pay Directive relating to a one-time recognition payment for managers. The eligibility criteria for the recognition payment included a stipulation that managers:

Not be subject to individual procedures that could lead to dismissal including poor conduct, capability and attendance.

21. The Claimant was not given a recognition payment. He was told that this was because he was not eligible because of the provision above. He gave evidence and produced a text message suggesting that another employee, Gurpal Sidhu, was given a recognition payment of £2,900 under the Pay Directive, even though he was under a disciplinary suspension at the time. The Claimant also stated that, to his knowledge, Mr Sidhu's recognition payment was an error which had "slipped through". The Claimant's evidence on this was unchallenged and we accept it.

THE LAW

Unfair dismissal

22. By section 94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed.

23. In a claim for unfair dismissal, the employer must show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason (s.98(1) ERA). Potentially fair reasons include reasons related to conduct.

24. If the employer has shown that the dismissal was for a potentially fair reason, the Tribunal must determine whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason to dismiss the employee. In determining this question the Tribunal must have regard to the circumstances of the case, including the size and administrative resources of the employer's undertaking and equity and the substantial merits of the case (s.98(4) ERA).

25. In a misconduct dismissal the Tribunal should consider: (1) whether the employer carried out an investigation into the matter that was reasonable in the circumstances of the case; (2) whether the employer believed that that employee was guilty of the misconduct complained of; and (3) whether

the employer had reasonable grounds for that belief (*British Home Stores Ltd v Burchell* [1980] ICR 303; *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA at §§35-36).

26. The Tribunal should then decide on the reasonableness of the Respondent's response. In conducting this enquiry the Tribunal should keep in mind that the "band of reasonable responses" test applies to all aspects of the dismissal (*Burchell*; *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA). The Tribunal should not substitute its own view of what is an adequate procedure for that which could be expected of a reasonable employer. The question is not whether there was something else which the employer ought to have done, but whether what it did was reasonable (*Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 CA).
27. A reasonable investigation is an essential safeguard, as has been restated in a multitude of cases. See for example *Weddel & Co Ltd v Tepper* [1980] IRLR 96 at 101:

... [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case, "gathered further evidence" or, in the words of Arnold J in the Burchell case, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably.
28. At the disciplinary hearing the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. He should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this (ACAS Code §12).
29. Appeals should be dealt with impartially (ACAS Code §27). Procedural defects in a disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness: *Taylor v OCS Group Ltd* [2006] IRLR 613 CA.
30. In considering whether the employer acted fairly in dismissing the employee rather than applying some lesser sanction such as demotion, the Tribunal

must be particularly astute to observe the band of reasonable responses test.

31. In some cases dismissal may be inequitable, and therefore an unfair sanction, because the employer has treated comparable cases differently (*Post Office v Fennell* [1981] IRLR 221 CA). However:
 - 31.1. The comparator case(s) must truly be similar (*Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352; *Procter v British Gypsum Ltd* [1992] IRLR 7; *Paul v East Surrey District Health Authority* [1995] IRLR 305 CA), although it is not a valid ground of distinction that different decision making managers dealt with the different cases (*Cain v Leeds Western Health Authority* [1990] IRLR 168).
 - 31.2. The employer must have been aware of the conduct of the comparators (*Wilcox v Humphreys and Glasgow Ltd* [1975] ICR 333 QBD).
 - 31.3. If the employer has consciously turned its mind to the comparison and has distinguished the cases, a challenge will only be successful if the distinction made by the employer is irrational (*Securicor Ltd v Smith* [1989] IRLR 356 CA; *Harrow London Borough v Cunningham* [1996] IRLR 256).
 - 31.4. Even a clear inconsistency is only a factor, and it may have to give way to flexibility. Particular leniency in the past does not bind an employer to deal with all cases in the future in the same way (see *United Distillers v Conlin* [1992] IRLR 503 EAT).
32. If the Claimant was unfairly dismissed, a reduction may be made to his compensation on the basis that he would have been dismissed even if a fair procedure had been followed (*Polkey v A E Dayton Services Ltd* [1988] ICR 142 HL, *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 EAT). This reduction may be made on a percentage basis to reflect the chance that the Claimant would have been dismissed in any event. The question is whether if there had been a fair procedure the result would still have been a dismissal (*Whitehead v The Robertson Partnership* UKEAT/0378/03, [2004] All ER (D) 97 (Aug) (17 August 2004, unreported). The assessment must be made by reference to how the particular employer in question would have acted and not by the standards of a hypothetical reasonable employer. The burden is on the Respondent to show that the employment would have ended in any event (*Britool Ltd v Roberts* [1993] IRLR 481).
33. The Tribunal may also make a reduction to compensation for contributory fault in such amount as it considers just and equitable if it finds that the Claimant has, by any action, caused or contributed to his dismissal (s.123 ERA). This reduction should be made only if the Claimant was “guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy” (*Gibson v British Transport*

Docks Board [1982] IRLR 228). The Tribunal should take “a broad, commonsense view of the situation” in deciding both whether to make a reduction and if so in what amount (*Maris v Rotherham Corpn* [1974] IRLR 147 NIRC).

Direct discrimination

34. By s.13(1) of the Equality Act 2010 (“EqA”) an employer directly discriminates against an employee if it treats him less favourably because of a protected characteristic than it treats or would treat others.
35. By s.4 EqA the protected characteristics include race.
36. In a discrimination case, the Claimant must prove on the balance of probabilities facts from which the Tribunal “could conclude”, in the absence of an adequate explanation, that the Respondent has committed an act of unlawful discrimination (“the first stage”). This means that the Claimant must show facts from which the Tribunal could conclude that:
 - 36.1. the Claimant has been dismissed or subjected to a detriment; and
 - 36.2. in being dismissed or subjected to the detriment the Claimant has been treated less favourably than a real or hypothetical comparator was or would have been treated. There must be no material difference between the circumstances of the Claimant and the comparator (other than the protected characteristic) (s.23 EqA); and
 - 36.3. that an effective cause of the difference in treatment was the protected characteristic (*O’Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor* [1997] ICR 33 EAT).
37. At the first stage the Tribunal should consider all the primary facts, not just those advanced by the Claimant. The Tribunal should assume that there is no adequate explanation (*Hewage v Grampian Health Board* [2012] ICR 1054 §31, Guideline 6 in *Igen*). “Could conclude” means “a reasonable tribunal could properly conclude” from all the evidence before it (*Madarassy v Nomura International plc* [2007] ICR 867 CA).
38. There does not have to be positive evidence that the difference in treatment is the prohibited ground in order to establish a prima facie case (*Network Rail Infrastructure Ltd v Griffiths-Henry* UKEAT/0642/05/CK at §18).
39. The decision that the Tribunal “could conclude” that there was discrimination may rely on the drawing of inferences from primary facts: guideline 5 in *Igen v Wong* [2005] IRLR 258 CA.
40. If the burden of proof shifts, the Respondent must show that it did not commit those acts and that the treatment was not on the prohibited ground: guidelines 9 and 10 in *Igen* (“the second stage”).

41. At the second stage the Tribunal must assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question: guideline 12 in *Igen*.
42. Tribunals should be careful not to approach the *Igen* guidelines in too mechanistic a fashion (*Hewage* §32, *London Borough of Ealing v Rihal* [2004] EWCA Civ 623 §26). The question is a fundamentally simple one of asking why the employer acted as it did (*Laing v Manchester City Council* [2006] ICR 1519 at §63).
43. In every case the Tribunal should consider the totality of the primary facts and examine indicators from the surrounding circumstances and the previous history (*King v Great Britain China Centre* [1992] ICR 516 CA).

Unauthorised deductions from wages

44. By s.13 of the Employment Rights Act 1996 (“ERA 1996”) an employer must not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.
45. By s.27(1)(a) ERA 1996 “wages” includes “any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise”.
46. By s.23(1) ERA 1996 a worker may present a complaint to the Employment Tribunal that his employer has made a deduction from his wages in contravention of s.13 ERA. The time limit is 3 months beginning with the date of payment of the wages from which the deduction was made (s.23(2)(a) ERA 1996) with an extension for early conciliation, unless it was not reasonably practicable to present the claim in time and it was presented within such further period as the Tribunal considers reasonable.
47. If the complaint is about a series of deductions or payments, the three month time limit starts to run from the date of the last deduction or payment in the series (s.23(3) ERA 1996).

CONCLUSIONS

Unfair dismissal

The reason for the dismissal

48. We find that the Respondent has satisfied the burden of showing that the true reason for the Claimant’s dismissal was a reason relating to conduct.

We considered the letter received by the Claimant from Mr Forbes on 15 December 2020, but we do not find that this was sufficient to demonstrate that Mr Coke had an ulterior motive for dismissing the Claimant in August 2021. We accept that the reason in the Respondent's mind was that the Claimant had committed an act of gross misconduct, namely violent and abusive behaviour towards Mr Sathyadevan.

Fairness in the circumstances

Were the reasons for the Claimant's suspension added to without further evidence having come to light?

49. We do not find that the changes that were made to the wording of the letters by which the Claimant was informed of his ongoing suspension impacted on the fairness of the dismissal. The reasons given for the suspension were separate to the disciplinary investigation. Furthermore the reasons that were given for the Claimant's suspension on 26 May 2021 were not substantively different to the brief reasons given in the letter of 11 May 2021.

Did Mr Iqbal, the investigating manager, allow other people to take over the investigation, including the dismissing manager Ken Coke?

50. We find that Mr Iqbal allowed Mr Coke to undertake a part of the disciplinary investigation, namely the interview with Mohammed Khan, the security guard who was an eye witness to the altercation, on 26 May 2021. Mr Khan was one of the three (or potentially four) eye witnesses, and the only one who had witnessed almost the entirety of the altercation. In evidence, Mr Iqbal accepted that Mr Khan's statement was inadequate and that he should have interviewed him himself. There was no need for Mr Coke to be involved in the investigation, given the very substantial size and administrative resources of the Respondent. Moreover, Mr Coke clearly had regard to Mr Khan's evidence when reaching his decision to dismiss the Claimant, since some parts of the dismissal letter replicated the words in Mr Khan's statement.
51. No explanation was offered by the Respondent for the fact that the disciplinary manager was involved in the investigation in this way. We find that it was unfair and fell outside the range of reasonable responses open to an employer of the size of the Respondent.
52. We also considered the fact that Mr Iqbal did not interview Mr Sathyadevan at investigation stage, despite the fact that his witness statement said that he had. Nor was Mr Sathyadevan interviewed by Mr Coke at disciplinary stage. Instead, at the Claimant's investigation and disciplinary stage the Respondent relied on the interview given by Mr Sathyadevan to a different investigator in the course of his own disciplinary process. In our view this meant that neither Mr Iqbal nor Mr Coke had a proper opportunity to probe Mr Sathyadevan's evidence or to assess his credibility by comparison to the Claimant. This was a case in which the relative credibility of the two

accused employees was central to the issues, and Mr Sathyadevan's credibility was clearly questionable. For example:

- 52.1. Mr Sathyadevan said that as he walked past the Claimant's car, the Claimant started swearing at him. He also said that the Claimant had got into his car and hit him. He gave no reason as to why the Claimant might do such surprising and incongruent things.
 - 52.2. He said that there was a two to three inch gap between his car and the Claimant's car, yet did not explain how he had nonetheless managed to manoeuvre his car out of the space.
 - 52.3. He said both that he had opened the passenger door of his car and that the Claimant did so.
 - 52.4. He said that inside the car he was holding the Claimant's jacket sleeves down over his hands to restrain him, yet the Claimant had managed to get out of his jacket. This would seem to be physically impossible.
 - 52.5. He said that he pushed the Claimant in order to defend himself when the Claimant came back to get his jacket, without saying what he was defending himself from.
53. We find that this failure properly to compare the credibility of the Claimant and Mr Sathyadevan led to unfairness to the Claimant and fell outside the range of reasonable responses. We do not think that this was rectified on appeal. Ms Walsh conducted Mr Sathyadevan's appeal hearing two weeks before she conducted the Claimant's appeal hearing. In the Claimant's hearing she referred to things said by Mr Sathyadevan during his hearing, but the Claimant did not have the notes. Ms Walsh intended to send some extracts of the notes of Mr Sathyadevan's appeal hearing to the Claimant on 5 October, three weeks after his own appeal hearing, but she failed to enclose them in her letter. This put the Claimant at a disadvantage. For example, the notes of Mr Sathyadevan's appeal hearing show that he identified another potential eye witness, Ravinder Hothi. Mr Hothi had not been interviewed in the investigation. In his appeal hearing Mr Sathyadevan said that although Mr Hothi was in the vicinity "he didn't see or hear anything". Ms Walsh told us in evidence that she took Mr Sathyadevan at his word on this point. The Claimant was disadvantaged by not knowing that Mr Hothi had been identified as a potential witness.
54. Even if Ms Walsh had sent the notes of Mr Sathyadevan's appeal hearing to the Claimant on 5 October 2021, we do not know what purpose this would have served given that she did not reconvene the Claimant's appeal hearing thereafter. Furthermore we saw no evidence that Ms Walsh conducted any proper comparative analysis of the credibility of the Claimant and Mr Sathyadevan. Her letter to the Claimant dismissing his appeal did not suggest that she did so.

Did Mr Iqbal prompt witnesses?

55. In our view there was no compelling evidence that Mr Iqbal unduly prompted the witnesses he interviewed.

Were the documents passed by Mr Iqbal to Mr Coke incomplete and did he not make a summary of the witness evidence to pass on to Mr Coke?

56. At the conclusion of his investigation Mr Iqbal did not compile an investigation report. The entirety of his handover to Mr Coke was his short letter of 15 June 2021.

57. We were surprised that an investigation conducted by an employer of the size and administrative resources of the Respondent would not result in a proper report containing a summary and analysis of the evidence. In the circumstances we find that this omission fell outside the range of reasonable responses.

58. Furthermore, under the Respondent's Conduct Policy Mr Iqbal was required to decide whether or not the Claimant had a case to answer. However it is clear from his letter of 15 June 2021 that he did not do so. In his witness statement he indicated that he thought that it was for Mr Coke to decide whether there was a case to answer. There was no evidence that Mr Coke understood that Mr Iqbal had not addressed his mind to the point, or that he himself ever did so. The only reasonable conclusion is that nobody considered whether there was a case to answer, but that Mr Coke proceeded on the basis that Mr Iqbal had reached that conclusion on the basis of the evidence he had gathered.

59. Therefore, nobody applied any analysis to the evidence at a pre-dismissal stage in order to decide whether it was adequate to establish a case to answer or whether there were any problems with it. In fact there were problems with the evidence, such as Mr Hussein's unclear and vague evidence about what had happened inside the car, which was the key moment at which both the Claimant and Mr Sathyadevan alleged that physical violence had first occurred.

60. We find that this failure was unfair and fell outside the range of reasonable responses. It was not rectified on appeal. In her decision letter Ms Walsh simply found that the Claimant should have understood what had happened because he knew what was meant to happen under the policy. This did not address the consequences of what had gone wrong.

Did Mr Coke say during the Claimant's conduct interview that he was going to reinterview a witness, but not do so?

61. We have found that during the Claimant's conduct interview Mr Coke recognised that Mr Hussein's evidence was unsatisfactorily vague, and undertook to reinterview him before reaching a decision. He did not do so. Mr Coke did not give evidence for the Respondent, so there was no evidence before us about why he had not reinterviewed Mr Hussein.

62. Mr Hussein was the main witness other than the Claimant and Mr Sathyadevan to the altercation in the car park, but his evidence was questionable; for example, he said both that he had been unable to see how the Claimant's jacket came off and that he had been able to see the two men's arms moving inside the car.
63. Under cross-examination Ms Walsh said that on appeal Mr Hussein was her "key witness" in determining what happened during the altercation. She based her finding that the Claimant had used violence on the fact that Mr Hussein had said that he had seen arms moving inside the car, and that there were photographs of injuries to Mr Sathyadevan. She did not consider whether the Claimant might have acted in self defence, since Mr Hussein had said that the Claimant had opened the car door and she felt that this was "threatening and provocative". She did not consider whether Mr Hussein might have colluded with Mr Sathyadevan. She did not state that she had considered whether Mr Sathyadevan's minor facial injuries may have been caused when the Claimant was flailing around in the car with his jacket pulled over his face in an attempt to escape.
64. Mr Chaudhry told us that the Respondent's case about what had happened during the altercation was based on Mr Hussein's statement, and in particular on his evidence that the Claimant had opened Mr Sathyadevan's car door. During his submissions in his strike out application, Mr Chaudhry said that the Respondent would have attempted to settle the case if it had known earlier that Mr Coke had conceded in the conduct meeting that Mr Hussein's statement was vague and that he had undertaken to reinterview Mr Hussein. This was very close to being a concession that Mr Coke's failure to reinterview Mr Hussein was fatal to the Respondent's defence to the unfair dismissal claim. As a result the Tribunal considered whether to exercise its discretion to strike out the Respondent's defence to the unfair dismissal claim. However, given that the proceedings were at an advanced stage we decided that it would not be a proportionate or effective use of time to embark upon that exercise.
65. We find that Mr Coke's failure to reinterview Mr Hussein was unfair to the Claimant and well outside the range of reasonable responses. This was not rectified on appeal; indeed, it was exacerbated. Thus the Respondent did not carry out as much investigation as was reasonable in the circumstances of the case.

Did Mr Coke's dismissal letter include large portions of the interview he had conducted with the security guard during the investigation?

66. The Tribunal does not conclude that substantial parts of the dismissal letter replicated Mr Khan's statement, although some wording from it does appear in the letter.
67. However, the Tribunal does consider that the level of detail in the dismissal letter is so poor as to mean that the letter was entirely inadequate to show that Mr Coke had addressed his mind to the appropriate matters or

conducted any proper analysis of the facts and evidence. The reason given for the Claimant's summary dismissal was that he was guilty of "violent and abusive behaviour" on the basis that he had been "involved in a fight with another Royal Mail employee". Mr Coke made no finding about who initiated the physical violence, whether the Claimant might have acted in self defence or what aspect of the Claimant's behaviour was abusive and why. The findings on which he placed particular weight were that the Claimant had not responded to Mr Sathyadevan sounding his car horn and that he did not think that Mr Sathyadevan could have reached across the car to grab the Claimant by his jacket. The relevance of these findings was not explained, although the inference from the second must be that he concluded that the Claimant voluntarily entered Mr Sathyadevan's car.

68. We find that this was a wholly insufficient basis upon which to conclude that the Claimant was guilty of violent and abusive behaviour, and well outside the range of reasonable responses. In the absence of any evidence from Mr Coke before us, we conclude that at the time of the dismissal the Respondent did not have reasonable grounds to maintain its belief in the Claimant's guilt.
69. We do not find that this error was rectified on appeal. Although Ms Walsh's appeal outcome letter was more detailed, her reasoning was equally erroneous for the reasons given in paragraph 63 above.

Did the witness evidence support the conclusion that the Claimant had hit another employee?

70. The Tribunal finds that the evidence upon which the Respondent relied in order to dismiss the Claimant was a wholly insufficient basis for his dismissal. We note that both Ms Walsh and Mr Chaudhry stated that they relied entirely on Mr Hussein's evidence and the photographic evidence of injuries to both parties. We have stated above why we consider the reliance on this evidence to have been unreasonable and unfair.

Was Mr Coke's decision to dismiss the Claimant excessive?

71. We have found that Mr Coke's decision was not based on a reasonable investigation and that he did not have reasonable grounds upon which to maintain his belief in the Claimant's guilt. We therefore do not need to consider the hypothetical question of whether the decision to dismiss the Claimant was excessive, and we see no value in doing so.

At appeal, did Ms Walsh believe other witnesses over the Claimant for no good reason?

72. We find that Ms Walsh disbelieved the Claimant's evidence and accepted the evidence of other witnesses without satisfactorily explaining why. In particular, she accepted certain aspects of Mr Sathyadevan's evidence and Mr Hussein's evidence for no apparent reason. We have explained our findings as to Ms Walsh's approach to Mr Hussein's evidence above. As to

Mr Sathyadevan's evidence, she said in evidence that she was "not sure" why she took him at his word on whether Mr Hothi had seen or heard the altercation and decided not to interview him, and that she thought this was because she "had enough evidence to support that the incident took place and the Claimant was involved in the violence". We find that this indicates that Ms Walsh was looking to prove that the Claimant was guilty, rather than considering the evidence impartially.

73. We find that Ms Walsh's approach to the evidence was unfair and fell outside the range of reasonable responses.

At appeal, was a lot of the Claimant's paperwork not read?

74. The Tribunal does not conclude that Ms Walsh failed to read the Claimant's paperwork. We did not see evidence that this was the case.

The Claimant was treated inconsistently with the way in which Trevor Reynolds and James King were treated in similar circumstances.

75. The Tribunal was not satisfied that Trevor Reynolds and James King were in sufficiently similar situations to the Claimant to be appropriate comparators for his unfair dismissal complaint. In both cases, the conduct alleged was of only a broadly similar nature to that alleged against in that it involved physical aggression and/or abusive language. This is an insufficient basis upon which to conduct a valuable comparison exercise.

Polkey

76. In our view, the evidence shows that Claimant was the victim of an assault after he properly sought to challenge unacceptably aggressive behaviour by Mr Sathyadevan in an appropriate manner. There was no evidence other than that of Mr Sathyadevan that the Claimant initiated any violence. Mr Sathyadevan's evidence so clearly lacked credibility that it could not fairly be relied upon, for the reasons stated in paragraph 52 above. The evidence of the other witnesses was consistent with the Claimant attempting first to extricate himself from the situation when Mr Sathyadevan became violent towards him and then to recover his jacket and retreat whilst Mr Sathyadevan continued to physically assault him. The photographic evidence did not establish that the Claimant had been violent, but rather was consistent with there having been a scuffle whilst the Claimant was attempting to remove his jacket, as was Mr Hussein's evidence that he saw arms moving around in the car. Furthermore Mr Sethi's evidence was that Mr Sathyadevan had admitted to him that his finger injury was sustained when he caught his finger on the Claimant's zip. That was consistent with the Claimant's case that Mr Sathyadevan had grabbed his jacket from inside the car. The Claimant admitted to having used swearwords during the altercation. However, there was no good reason to disbelieve his evidence that he did so in a misguided attempt to de-escalate the situation, or to fail to take into account the extreme provocation that he was facing. His use of swearwords did not, in our view, merit any disciplinary action.

77. We conclude that, if it had acted reasonably in the circumstances by conducting a fair investigation, the Respondent would not have dismissed the Claimant.

Contributory fault

78. For the reasons given in paragraph 76 above we find that the Claimant did not contribute to his dismissal by any culpable conduct.

Direct race discrimination

Less favourable treatment and the comparators

79. The Claimant was clearly treated less favourably than Mr Reynolds or Mr King were treated, since he was dismissed. However, we found that neither Mr Reynolds nor Mr King was an appropriate direct comparator, since the allegations against them were not sufficiently similar to those against the Claimant. We also had limited information about the surrounding circumstances of each case.
80. We considered whether the Claimant had shown facts from which we could conclude that a hypothetical comparator would have been treated differently. We took into account the evidence given about how Mr King and Mr Reynolds were treated. However, we did not find that the evidence before us amounted to a sufficient basis for us to conclude that a hypothetical comparator of a different race would not have been dismissed in the same circumstances as the Claimant.
81. We therefore found that the Claimant had not shifted the burden of proof to the Respondent on the question of less favourable treatment.

Because of race

82. If we are wrong on the question of less favourable treatment, we also find that the Claimant did not adduce evidence on the basis of which we could conclude that any less favourable treatment was because of his race. The evidence before us as to the actual comparators, Mr King and Mr Reynolds, was only that there was a difference of treatment and a difference of race between them and the Claimant. There was nothing further from which we could infer that race played any part in the Claimant's treatment. We took into account the fact that the Respondent had initially made inadequate disclosure in relation to the comparators, necessitating further disclosure in the course of the trial. We considered whether we could make an inference as to the reason for the treatment from this failure to produce adequate disclosure, but we concluded that we could not.
83. Accordingly we find that the Claimant has not shifted the burden of proof to the Respondent on the question of the reason for the treatment.

84. The Claimant's race discrimination claim must therefore fail.

Unauthorised deductions from wages

85. We find that the Claimant was not entitled to the recognition payment announced in July 2021 because he was not eligible for it. That was clear from the wording of the Pay Directive, which excluded those who were subject to procedures that could lead to dismissal. Therefore the Claimant never had a legal or other entitlement to the payment, and it did not constitute "wages" for the purposes of ss.13 and 27 ERA 1996.

86. The fact that Mr Sidhu was given the recognition payment in error does not create a legal or other entitlement for the Claimant to receive it.

Remedy and costs

87. The Tribunal heard some evidence about the Claimant's claim for financial compensation. However, in his ET1s the Claimant also sought reinstatement or reengagement. Not having heard evidence on these potential remedies, we consider it necessary to list this matter for a further one day hearing. At that hearing we will also determine the Respondent's costs application, if it is pursued. The parties will receive notice of the hearing under separate cover.

Employment Judge Reindorf KC

Date 1 April 2024

Sent to the parties on:

8 April 2024

For the Tribunal:

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